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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~414.~~ 188

ROBERT M. SHOEMAKER AND EDWARD MILLER, PLAINTIFFS IN ERROR,

vs.

E. W. KINGSBURY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED JANUARY 3, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 414.

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INDEX.

COPY OF PAPERS IN DISTRICT COURT, COUNTY OF LEAVENWORTH.

	Original.	Print.
Petition	2	1
Præcipe	5	2
Summons	6	2
Sheriff's return	7	3
Petition to transfer case	8	3
Undertaking for costs	10	4
Transfer bond	11	4
Affidavit for transfer	13	4
Order of court on transfer	15	5
Order of court for removal	16	6
Certificate	17	6
Filing of copies in United States circuit court	18	6

PROCEEDINGS IN UNITED STATES CIRCUIT COURT, DISTRICT OF KANSAS.

Order granting plaintiff leave to file new petition	19	6
New petition	20	7
Answer	23	8
Affidavit	24	8
Motion for security for costs	32	11
Affidavit in support thereof	33	11
Order that plaintiff give security for costs	34	12
Security for costs	34	12
Proceedings of trial	35	12
Proceedings of trial—jury disagree, and case continued	37	13
Motion of plaintiff to amend petition	38	13
Order taking motion to amend under advisement	39	13

	Original.	Print.
Order sustaining motion to amend	40	14
Amended petition	41	14
Answer	44	15
Proceedings of trial	46	16
Proceedings of trial	47	16
Verdict	49	17
Motion for new trial	49	17
Motion for new trial heard	52	18
Motion for new trial overruled and judgment	53	18
Bills of exceptions, four	55	19
Appeal bond	117	36
Certificate	119	36
Writ of error	120	37
Citation	123	37

1 Pleas before the Honorable Mark W. Delahay, associate justice of the circuit court of the United States of America for the district of Kansas, at a term of said court begun and held at the city of Topeka, in said district, on Monday, the 22d day of November, A. D. 1869.

E. W. KINGSBURY
vs.
ROBERT M. SHOEMAKER, AND MILLER, whose first name is unknown, partners, doing business under the firm name of Shoemaker, Miller & Co. } No. 141.

Be it remembered that, on the 29th day of April, A. D. 1868, the said defendants filed in the clerk's office of the circuit court of the United States for the said district of Kansas a transcript and copy of proceedings had in said cause in the district court in and for the county of Leavenworth and State of Kansas; which said transcript and copy of proceedings is in the words and figures as follows, to wit:

2 *Petition.*

In the 1st judicial district of the State of Kansas in and for Leavenworth Co., Kansas.

E. W. KINGSBURY
vs.
ROB'T M. SHOEMAKER, MILLER, whose name is unknown, partners, doing business under the firm name of Shoemaker, Miller & Co. } Petition.

The said E. W. Kingsbury, plaintiff, complains of the said Rob't M Shoemaker Miller, whose first name is unknown, partners, doing business under the firm name of Shoemaker, Miller & Co., def'ts, for that the said def'ts, before and at the time of the committing of the wrongs and injuries hereinafter stated, were the contractors for building the Union Pacific Railway, Eastern Division, running from the State line between Kansas and Missouri west to the terminus, viz, in the vicinity of Fort Hays, some 165 miles west of the town of Ellsworth, Kansas. That portion of the said railroad built west of Ellsworth was used by these defendants for the purpose of running their con-
3 struction trains and of transporting material for building the said railroad further west, and also for the purpose of transporting passengers and baggage over and upon said railroad to the end of the track, as far as laid, for certain hire and reward. And thereupon the said plaintiff, on the 8th day of October, A. D. 1867, at the special instance and request of the said defendants, and in the cars thereof, to be safely carried from Ellsworth to Walker's Creek, and return to Ellsworth for a certain hire and reward to the said defendants in that behalf. And the said plaintiff was then received by the said defendants in the cars, and on the railroad aforesaid, as received and used by the said def'ts exclusively, as such passenger, to be carried thereby as aforesaid. Yet the said defendants, not regarding their duty in that behalf, did, by their servants and agents, so carelessly, negligently, and unskillfully conduct the running of said cars and railroad that, on the 8th day of October, A. D. 1867, by the carelessness and negligence and default of

4 said agents and servants, and for want of due care and attention to their duty in that behalf, the said car was run off the track of said railroad, whereby the said plaintiff was greatly cut, bruised, and wounded, and the left arm, and left side, and shoulder of him, the said plaintiff, was injured so that the said plaintiff became and was sick, lame, and unable to walk for some time, unable to use his left arm, and was wholly unable to attend to the transaction and performance of his usual and necessary business, and so continued from thence hitherto. And said plaintiff has been put to great expense, to wit, to the amount of $1,000 00, in endeavoring to cure his said wounds, bruises, and fractures, to the damage of the said plaintiff in the sum of $20,000 00.

Wherefore he prays judgment against the said defendants for the said sum of $21,000 00, his damages so as aforesaid sustained.

PENDERY & GAMBLE,
RUNKLE & BLAKE,
Att'ys for Pl'ff.

5 *Precipe.*

Precipe: The clerk will issue a summons to the sheriff of Leavenworth Co., returnable according to law. Amount claimed, $20,000.

RUNKLE & BLAKE,
PENDERY & GAMBLE,
Att'ys for Pl'ff.

Which petition and precipe are endorsed and filed in the words and figures following, to wit:

(Endorsement:) P. 128, D. C. No. 2596. Petition. Kingsbury vs. Shoemaker, Miller & Co. Filed Dec. 26, A. D. 1867. Henry Carey, dist. clerk, by Charles Currier, D. C.

6 UNITED STATES OF AMERICA,
State of Kansas, First District, Leavenworth County, ss:

The State of Kansas to the sheriff of Leavenworth County, in said State, greeting:

You are hereby commanded to notify Rob't M. Shoemaker, Miller, whose first name is unknown, partners, doing business under the firm name of Shoemaker, Miller & Co., that they have been sued by E. W. Kingsbury in the district court, sitting in and for said county of Leavenworth; and that, unless they answer by the 25th day of January, A. D. 1868, the petition of the said E. W. Kingsbury against them filed in the clerk's office of said court, said petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 5th day of January, 1868.

Witness my hand and the seal of said court affixed at my office, in the city of Leavenworth, this 26th day of December, A. D. 1867.

[SEAL.] HENRY CAREY, *Clerk*,
By CHARLES CURRIER, *Deputy Clerk.*

7 Suit brought for the recovery of money. Amount claimed $20,000 00, with interest from the day of 186 , at the rate of per cent. per annum.

RUNKLE & BLAKE,
PENDERY & GAMBLE,
Attorney for Plaintiff.

(Indorsed:) Page 128, D. C. No. 2596. District court, Leavenworth County, Kansas. E. W. Kingsbury vs. Shoemaker, Miller & Co. Issued December 26, 1867. Returnable January 5, 1868. Runkle & Blake, Pendery & Gamble, plaintiff's attorneys.

Received this summons December 26, 1867, at twelve o'clock m., and served the same in my county same day on the within-named R. M. Shoemaker, by delivering him personally a true copy thereof. After diligent search in my county, I am unable to find the within-named defendant Miller, on whom to serve this summons.

JOHN McKEE, *Sheriff.*

Fees.

Services	85
Mileages	20
	$1 05

8 STATE OF KANSAS, *Leavenworth County:*

To the honorable district court of Leavenworth County:

Your petitioners, Rob't M. Shoemaker Miller, whose full name is endorsed Miller, respectfully show to the court that on the day of Dec., 1867, E. W. Kingsbury brought his action in said district court, which is now pending therein, wherein said E. W. Kingsbury is plaintiff and the said Rob't M. Shoemaker, and Edward Miller, by the name of Miller, are defendants, for the recovery of twenty thousand dollars.

And your petitioners further show to the court that said E. W. Kingsbury is now, and was at and before the commencement of this said action, a citizen of the State of Kansas; and that said Rob't M. Shoemaker was then, and still is, a citizen of the State of Kansas; and that the said Edward Miller was then, and still is, a citizen of the State of Missouri; and that the matter in controversy in said action exceeds five hundred dollars.

Your petitioners therefore pray that this honorable court ac-
9 cept and approve of bail for transmitting copies of all papers, as provided for in act of Congress of the United States of America for that purpose, to the next circuit court, to be held in the district of Kansas; and that an order be made by this court transferring said cause to said circuit court of the United States aforesaid, and for all other orders made necessary by said act.

By HURD & STILLINGS,
Their Attorneys.

(Indorsed:) District court of Leavenworth County. E. W. Kingsbury vs. Rob't M. Shoemaker and Miller, partners as Shoemaker, Miller & Co. Petition for transfer of the above cause to the circuit court of the U. S. Filed 24th Jan'y, 1868. Henry Carey, cl'k. Hurd & Stillings, att'ys for pl'ff.

10 An undertaking for costs was filed in the words and figures following, to wit:

In the 1st judicial dist. court in and for Leavenworth County, State of Kansas.

E. W. KINGSBURY
vs.
SHOEMAKER, MILLER & Co.

The undersigned are bound to the defendants that they will pay all costs that may be adjudged against the plaintiff in the foregoing entitled case.

E. W. KINGSBURY. [SEAL.]
J. S. BIRD. [SEAL.]

(Indorsed:) P. 128, D. C't. No. 2596. E. W. Kingsbury vs. Shoemaker, Miller & Co. Undertaking for costs. Filed Dec. 26th, 1867. Henry Carey, clerk, by Cha's Carey, D. C.

11 Know all men by these presents, that Daniel Shire are held and firmly bound unto E. W. Kingsbury in the penal sum of five hundred and fifty dollars; for the payment of which, well and truly to be made, we do by these presents bind ourselves, our heirs, our executors, our administrators, sealed with our seals, and dated this 23d day of January, A. D. 1868.

The condition of the above obligation is such, that whereas Rob't M. Shoemaker, Miller, first name unknown, but real name Edward Miller, have obtained an order from the district court of Leavenworth County, in the State of Kansas, for the removal and transfer of a cause pending in said district court, wherein E. W. Kingsbury is plaintiff, and Rob't M. Shoemaker & Miller are defendants, under and by virtue of an act of Congress of the United States for that purpose, to the circuit court of the United States for the district of Kansas:

12 Now, therefore, if the said Shoemaker & Miller shall enter copies of all process and papers in said action on the 1st day of the next circuit court of the United States, to be holden in said district, and appear in said action, then this obligation to be void; otherwise to be in full force and effect.

Witness my hand and seal the day and year above written.

DANIEL SHIRE. [SEAL.]

(Indorsed:) E. W. Kingsbury vs. Shoemaker, Miller & Co. Filed 24 Jan'y, 1868. Henry Carey, clerk.

13 An affidavit was filed in the words and figures following, to wit:

In the first judicial district of the State of Kansas in and for Leavenworth County, Kansas.

STATE OF KANSAS, *Leavenworth County:*

E. W. KINGSBURY
vs.
ROB'T M. SHOEMAKER, MILLER, (WHOSE real name is Edward Miller,) partners, doing business under firm name of Shoemaker, Miller & Co. } Affidavit.

Carlos S. Greeley, being duly sworn, deposes and says that he knows

all the above-named defendants, and knows the present residence of each of them; and that each and all of the defendants are now residents of the State of Kansas, and the said Rob't M. Shoemaker is a citizen and resident of the State of Ohio, and was a citizen and resident of said State of Ohio at and before the commencement of this action, and has ever since been such citizen; and that the said Edward Miller is a resident and citizen of the State of Pennsylvania, and was, at and
14 before the commencement of this action, and has been ever since, a citizen of the State of Pennsylvania; and that the said E. W. Kingsbury, plaintiff herein, is and was, at the commencement of this action, a citizen of the State of Kansas; and that the matter in dispute in said action exceeds the sum of five hundred dollars.

CARLOS S. GREELEY.

[5-ct. int. rev. stamp.]

STATE OF MISSOURI, *County of St. Louis:*

Carlos S. Greeley, being first duly sworn, deposes and says that the facts set forth in the foregoing affidavit are true.

Sworn to before me and subscribed in my presence by the said Carlos S. Greeley this 20th day of January, A. D. 1868.

Witness my hand and the seal of my office this the day and year above written.

[NOTARIAL SEAL.] T. F. OAKES,
Notary Public.

(Indorsed:) E. W. Kingsbury vs. Shoemaker, Miller & Co. Affidavit. Filed Feb'y 15th, 1868. Henry Carey, clerk, by Cha's Currier, D. C.

15 November term, A. D. 1867.

Be it remembered that, at a session of the district court of the 1st judicial district of the State of Kansas, sitting in and for Leavenworth County, at the November term, A. D. 1867, of said court, begun and held in the city of Leavenworth on Monday, the 11th day of November, A. D. 1867—present, the Honorable David J. Brewer, judge; John McKee, sheriff; and Henry Carey, cl'k—among others the following proceedings were had, to wit:

Friday, 24th of Jan'y, A. D. 1868.

E. W. KINGSBURY
vs.
ROB'T M. SHOEMAKER AND MILLER, partners as Shoemaker, Miller & Co. } 2596.

The defendants in the above-entitled action this day came and filed their petition to have the above action removed and transferred to the circuit court of the United States next to be held in the district of Kansas, and give bail for entering, on the first day of the session of
16 said circuit court next to be held in said district, copies of the proofs and pleadings in said action, and for the appearing thereto, such security approved by the court; and thereupon the further consideration of said application of the plaintiff herein is deferred til a further day of this court.

Saturday, Feb'y 15th, A. D. 1868.

E. W. KINGSBURY
vs.
ROB'T M. SHOEMAKER, MILLER, whose first name is unknown, partners, doing business under the firm name of Shoemaker, Miller & Co. } No. 2596.

This cause came on to be heard on the petition of the defendants herein for the removal of the cause to the circuit court of the United States next to be held within the district of Kanzas for trial; and the court being satisfied, upon the proofs filed herein, that said pl'ffs
17 are residents of the State of Kanzas, and the defendants are all residents of other States, and said defendants having filed bond which is approved by the court, it is ordered that this cause be removed to the circuit court of the United States aforesaid for trial; and that the clerk of this court make copies of all papers and process herein for the further proceeding in this cause in the said district court.

STATE OF KANSAS, *Leavenworth County, ss:*

I, Henry Carey, clerk of the district court of the first judicial district of the State of Kansas, sitting in and for the county of Leavenworth, do hereby certify that the above and foregoing is a true, full, and complete copy of all papers and proceedings had in the foregoing entitled cause, as the same remains filed and of record in my office.

Witness my hand and the seal of said court affixed at my office
18 in the city of Leavenworth, county and State aforesaid, this the 15th day of April, A. D. 1868.

[SEAL.] HENRY CAREY, *Clerk*,
By CHARLES CURRIER, *D. C.*

Which said transcript and copy of proceedings is endorsed in the words and figures following, to wit:

No. 141. E. W. Kingsbury vs. Shoemaker, Miller & Co. Transcript. Fee, $4 50, paid. Filed April 29th, 1868. A. S. Thomas, clerk.

19 And afterwards, to wit, at a term of the circuit court of the United States in and for the district of Kansas, begun and held at Topeka, in said district, on Monday, the twenty-fifth day of May, in the year of our Lord one thousand eight hundred and sixty-eight—present, Hon Samuel F. Miller and Hon Mark W. Delahay, judges; Charles C. Whiting, U. S. marshal; and A. S. Thomas, clerk—proceedings were had in said cause, and appear of record in the words and figures following, to wit:

Wednesday, May 27, 1868.

E. W. KINGSBURY
vs.
SHOEMAKER, MILLER & CO. } 141.

On motion of J. L. Pendery, attorney for plaintiff, it is ordered by the court that the plaintiff have leave to file a new petition herein; and, by agreement of attorneys herein, this cause continued to the next term of this court.

And afterwards, to wit, on the said 27th day of May, A. D. 1868, the said plaintiff, by his attorneys, J. L. Pendery, & Runkle & Blake,
20 filed herein his petition, which is in the words and figures following, to wit:

In the circuit court of the United States, sitting in and for the State of Kansas.

E. W. KINGSBURY
vs.
ROBERT M. SHOEMAKER, & MILLER, whose first name is unknown, def't. } Petition.

The said E. W. Kingsbury, the plaintiff, complains of the said Robert M. Shoemaker, & Miller, whose first name is unknown, partners, doing business under the firm name of Shoemaker, Miller & Co., defendants, for that the said defendants, before and at the time of the committing of the wrongs and injuries hereinafter stated, were the contractors for building the Union Pacific Railway, Eastern Division, running from the State line between Kansas and Missouri west to the terminus, viz, in the vicinity of Fort Hays, some 165 miles west of the town of Ellsworth, Kansas.

That portion of the said railroad built west of Ellsworth was used by these defendants for the purpose of running their construction
21 trains, and of transporting materials for building the said railroad further west, and also for the purpose of transporting passengers and baggage over and upon said railroad to the end of the track, as far as said, for certain hire and reward. And thereupon the said pl'ff, on the 8th day of October, A. D. 1867, at the special instance and request of said defendants, and in the cars thereof, to be safely carried from Ellsworth to Walker's Creek and return to Ellsworth, for a certain hire and reward to the said defendants in that behalf; and the said pl'ff was thenn received by the said defendants in the cars and on the railroad aforesaid, as run and used by the said defendants exclusively, as such passenger, to be carried thereby as aforesaid.

Yet the defendants, not regarding their duty in that behalf, did, by their servants and agents, carelessly, negligently, and unskillfully conduct the running aforesaid cars and railroad; that on the 8th day of October, A. D. 1867, by the carelessness, negligence, and default of said agents and servants, and for want of due care and attention
22 to their duty in that behalf, the said car was run off the track of said railroad, whereby the said plaintiff was greatly cut, bruised, and wounded, and the left arm, and left side and shoulder of him, the said pl'ff, was injured so that the said plaintiff became and was sick, lame, and unable to walk for some time, and was unable to use his left arm, and was wholly unable to attend to the transaction and performance of his usual and necessary business, and so continued from thence hitherto; and said plaintiff has been put to great expense, to wit, to the sum of $1,000, in endeavoring to cure his said wounds, bruises, and fractures, to the damage of this plaintiff in the sum of $20,000.

Wherefore plaintiff prays judgment against the defendants for the sum of $21,000, his damages so as aforesaid sustained.

J. L. PENDERY,
KUNKLE & BLAKE,
Att'ys for Pl'ff.

Which said petition is in the words and figures endorsed as fol-
23 lows, to wit:

No. 141. E. W. Kingsbury vs. R. M. Shoemaker et al. Petition. Pendery & Runkle & Blake. Filed May 27, 1868. A. S. Thomas, clerk.

And afterwards, to wit, on the 25th day of November, A. D. 1868, the said defendants, by their attorneys, Hurd & Stillings, filed in the office of the clerk of said court their answer to the plaintiff's petition in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *District of Kansas:*

In the circuit court of the United States for the district of Kansas.

E. W. KINGSBURY
vs.
R. M. SHOEMAKER ET AL.

And now comes the said defendant, and for answer to the petition of the plaintiff denies generally and specifically each and every allegation of the said petition, and each and every part thereof.

HURD & STILLINGS,
Att'ys for Defendants.

And which said answer is endorsed in the words and figures following, to wit:

24 141. E. W. Kingsbury vs. R. M. Shoemaker et al. Answer. Hurd & Stillings, def'ts' att'ys. Filed Nov. 25, 1868. A. S. Thomas, clerk.

And afterwards, to wit, on the 26th day of November, A. D. 1868, there were filed in the office of the clerk of said court affidavits in words and figures as follows, to wit:

E. W. KINGSBURY
vs.
SHOEMAKER, MILLER & CO.

STATE OF KANSAS, *ss:*

J. P. Usher, being duly sworn, says that he came to Kansas some weeks since for the purpose of attending to the preparation of this cause, and of others, in which the def'ts are parties in this court, and in other courts in this State; that soon after his arrival at Lawrence he telegraphed Messrs. Hurd & Stillings, at Leavenworth, enquiring whether the above and other suits in which said Shoemaker, Miller & Co. are deft's in this court, would be tried at the then approaching
25 term, and was answered that they would not be tried; consequently deponent gave himself no further concern about the cause. Deponent now learns from Mr. Stillings that he was led to believe that the cause would not be tried, because he believed there was no petition on file in the case, and that it was not the intention of Mr. Pendery, pl'ff's att'y, to bring the cause to trial at this term.

J. P. USHER.

Subscribed and sworn to this 25th day of November, A. D. 1868.

A. S. THOMAS, *Clerk.*

(Endorsed:) No. 141. E. W. Kingsbury vs. R. M. Shoemaker & Co. Affidavit of . Filed Nov. 26, 1868. A. S. Thomas, clerk.

UNITED STATES OF AMERICA, *District of Kansas:*

In the circuit of the United States.

E. W. KINGSBURY
vs.
SHOEMAKER, MILLER & CO.

THE UNITED STATES OF AMERICA, *District of Kansas:*

E. Stillings, being duly sworn, deposes and says that, some
26 time after the adjournment of the last term of this court, affiant, under the belief that no petition had been filed in this case in pursuance of the order of this court, spoke to J. L. Pendery, the attorney of the plaintiff, whose office was in the same building with affiant's, to show the petition, which he should file, to affiant before sending the same to be filed; and that affiant would in like manner show to said Pendery the answer which affiant, as the attorney of the defendants, would file, so that he could reply to the same if he desired; and that said Pendery promised to do so; and that no such petition having been shown to affiant, or any notice of filing the same, affiant supposed and believed that no petition had been filed till the commencement of this court, and upon such belief advised Judge Usher that no trial would be had at the present term of this court.

E. STILLINGS.

Sworn to and subscribed before me this 26th day of Nov., 1868.
A. S. THOMAS, *Clerk.*

27 (Endorsed:) No. 141. E. W. Kingsbury vs. Shoemaker, Miller & Co. Affidavit. Filed Nov. 26, 1868. A. S. Thomas, clerk.

UNITED STATES OF AMERICA, *District of Kansas:*

In the circuit court of the United States for the district of Kansas.

E. W. KINGSBURY
vs.
SHOEMAKER, MILLER & CO.

UNITED STATES OF AMERICA, *District of Kansas:*

T. A. Hurd, of lawful age, being first duly sworn, says that he is a member of the firm of Hurd & Stillings, attorneys for the defendant; that, after the entry of the order allowing the plaintiff to file a petition in this court in the case, and in or about the first part of June, according to the best recollection, he, in the name of defendants' attorneys, wrote of the clerk of this court to send them a copy of the petition filed, if one had been filed in pursuance with the said order; if the petition had not then been filed, that, whenever the same should be filed, he should send defendants' attorneys a copy of the same.

28 Deponent further says that the def'ts' attorneys received no reply to the said letter, nor have they ever received a copy of the said petition, nor have they ever received any notice of the filing of the same from the plaintiff or his attorneys, or said clerk; and this deponent believed, until he saw the said petition on file on the 24th instant, that the same had not been filed in the case.

Deponent further says that, believing that no petition had been filed, the attorneys for the defendants supposed that the case would not be ready for trial at this term of the court, and would not be called for trial at this term.

Deponent further says he believes, after a statement of the case made by the defendant Shoemaker, the defendants have a full, perfect defense upon the merits of this action.

Deponent further says that, as he believes, Murray C. Shoemaker, who resides in the State of Ohio, is a material and necessary witness for the defendants, and also believes that said witness will swear that the train upon which the plaintiff claims to have been injured was
29 a construction train used by the defendants in constructing the railway of the Union Pacific railway, and not for carrying passengers, and that the employees upon said train were expressly forbidden to receive passengers upon said train, and that the plaintiff knew these facts before he went upon the train.

Deponent further says that he believes that the employees upon said train, whose names are unknown to deponent, are material and necessary witness for the defendant.

Deponent further says that he believes the persons last mentioned will swear that the instructions of the defendants to their said employees were that no persons, other than the employees of the def'ts, should ride upon the construction trains of the defendant, and that the plaintiff well knew of such instructions, and that he acted in defiance of such instructions.

Deponent further says that R. M. Shoemaker, who resides in the State of Ohio, is a necessary witness for the defendants, and that he believes said Shoemaker will swear that he had the principal
30 charge of the construction of said railway, and that the instructions of said Shoemaker, as the agent of the defendants, were that passengers should not be taken on the constructions trains of the defendants, and that the defendants received no compensation whatever from the plaintiff for passage upon the train, as alleged in the petition; and if the plaintiff was upon a train, as alleged in the petition, he was there against the express directions of the defendants to their employee in charge of said train.

Deponent further says that the att'ys for defendants are unable to give the names of the employees upon said train, and their several places of residence, but that he believes said persons can be found, and their evidence procured, by the next term of this court; and deponent does not know of any other persons within the State of , if any of them reside therein, by whom he can prove the same facts, and this application for a continuance is not made for vexation or delay, but that justice might be done.

Deponent further says that deponent rested upon the belief
31 that there was no petition filed in the case, and for that reason the case would not be tried at the present term of this court; otherwise the def'ts' att'ys would have made every effort in their power to be prepared for the trial of this cause at the present term of this court.

Deponent further says that all of the defendants are non-residents of the State of Kansas, and none of them are now within said State, to his knowledge, and that he has had the principal charge and management of this case as att'y for the defendants.

T. A. HURD.

Subscribed and sworn to before me this 26th day of November, 1868.

(Endorsed:) No. 141. E. W. Kingsbury vs. R. M. Shoemaker & Co. Affidavit. Filed Nov. 26, 1868. A. S. Thomas, clerk.

32 And afterwards, to wit, on the 9th day of January, A. D. 1869, there was filed in the office of the clerk of said court a motion for security for costs; which is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *District of Kansas:*

In the circuit court of the United States for the district of Kansas.

E. W. KINGSBURY
vs.
SHOEMAKER, MILLER & CO.

And now comes the said defendant and moves the court that an order be made that the plaintiff file security for costs in this cause, on the ground that he, the said defendant, is a non-resident of the district of Kansas. Affidavits will be read and used on the said motion.

HURD & STILLINGS,
Atty's for Defendant.

Which said motion is endorsed in the words and figures following, to wit:

No. 141. E. W. Kingsbury vs. Shoemaker, Miller & Co. Motion for security for costs. Hurd & Stillings, att'ys for def'ts. Filed Jan'y 9, 1869. A. S. Thomas, Clerk.

33 And afterwards, to wit, on the said 12th day of January, A. D 1869, the defendants filed in the office of the clerk of said court an affidavit in words and figures as follows, to wit:

SHOEMAKER, MILLER & CO.
ad.
E. W. KINGSBURY.

STATE OF KANSAS, *ss:*

T. A. Hurd, being duly sworn, says that he is the att'y of the def'ts; that the def'ts are not present; that he is informed and verily believes that the pl'ff is now a resident of the State of Missouri, and was at the time of filing motion for security for costs.

T. A. HURD.

Subscribed in my presence & sworn to before me this 12th day of Jan'y, 1869.

A. S. THOMAS, *Clerk.*

Which said affidavit is endorsed in the words and figures following, to wit:

No. 141. Shoemaker, Miller & Co., ads. E. W. Kingsbury. Affidavit Hurd. Filed Jan'y 12, 1869. A. S. Thomas, clerk.

34 And afterwards, to wit, at the said November term of said court, and on the 12th day of January, A. D. 1869, proceedings were had in said cause, and appear of record in the words and figures following, to wit:

Tuesday, January 12, 1869.

E. W. KINGSBURY
vs.
SHOEMAKER, MILLER & Co.

On motion of Hurd & Stillings, attorneys for defendants, it is ordered by the court that the plaintiff herein give good and sufficient security for costs in this case.

And afterwards, to wit, on the said 12th day of January, A. D. 1869, there was filed in the office of the clerk of said court security for costs in the words and figures following, to wit:

District court of the United States, district of Kansas.

E. W. KINGSBURY
vs.
SHOEMAKER, MILLER & Co.

I enter myself as security for costs in said case, and promise to pay all costs which may accrue to the opposite party in this action to,
35 or to any one of, the officers of this court. And in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 12th day of January, A. D. 1869.

E. W. KINGSBURY.
W'M SMITH.

Which said security for costs is endorsed in the words and figures following, to wit:

141. E. W. Kingsbury vs. Shoemaker, Miller & Co. Security for costs. Filed Jan'y 12, 1869. A. S. Thomas, clerk.

And afterwards, to wit, at the said November term of said court, and on the 13th day of Jauuary, A. D. 1869, proceedings were had in said cause in words and figures as follows, to wit:

Wednesday, January 13, 1869.

E. W. KINGSBURY
vs.
36 ROB'T M. SHOEMAKER, MILLER, whose first name is unknown, partners, doing business under the firm name of Shoemaker, Miller & Co. } 141.

This case being called for trial, now comes the said plaintiff and his attorneys, J. L. Pendery and A. H. Case, and the said defendants by their attorneys, T. A. Hurd and J. P. Usher, and announce themselves ready for trial. Thereupon came a jury, to wit, Ja's G. Bunker, Gabriel Wright, E. Bodwen, H. J. Loomis, George Dailey, B. McKee, John W. Norton, B. W. Swartz, M. R. Dutton, A. W. Hays, R. D. Mabley, and H. Anderson, twelve good and lawful men of the body of the district of Kansas, who, being duly empannelled and sworn to well and

truly try the issues joined and matters submitted to them, and a true verdict give according to the law and evidence, and the evidence in the case being produced and concluded, and the trial not being concluded at the hour of adjournment, the jury are admonished of their duties herein, and the further hearing of this case is postponed until to-morrow morning.

37 And afterwards, to wit, at the said November term of said court, on [on] the 14th day of January, A. D. 1869, proceedings were had in said cause in the words and figures following, to wit:

Tuesday, January 14, 1869.

E. W. KINGSBURY
vs.
ROB'T M. SHOEMAKER, MILLER, WHOSE first name is unknown, partners, doing business under the firm name of Shoemaker, Miller & Co.

And now come the parties herein same as yesterday, and the jury being called, and all being present, the trial is proceeded with; and the jury, after hearing the argument of the case and instructions given by the court, and the case being finally submitted, retire, under charge of a sworn bailiff, for deliberation, and who afterwards came into court under charge of the said sworn bailiff; and it satisfactorily appear-
38 ing that there is no probability of their agreeing, by consent of parties it is ordered by the court that the jury be discharged, and that this cause be continued to the next term of this court.

Pl'ffs motion to amend petition.

In the circuit court of the U. States for Kansas.

E. W. KINGSBURY
vs.
SHOEMAKER, MILLER & Co.

And now comes the plaintiff, and moves the court for leave to amend his petition in this case by interlineation, on the third page and sixteenth line thereof, commencing at the word "behalf" and ending at the word "the" in said line, in these words: "And without any fault, neglect, or carelessness on the part of said plaintiff."

A. H. CASE,
Att'y for P'f.

To DEFENDANTS.
JAN'Y 14, '68.

(Endorsed:) Filed Jan'y 14, 1869. A. S. Thomas, clerk.

39 And afterwards, to wit, at the said November term of said court, and on the 19th day of January, A. D. 1869, proceedings were had in said cause in the words and figures following, to wit:

Tuesday, January 19, 1869.

E. W. KINGSBURY
vs.
R. M. SHOEMAKER ET AL.

Now comes the plaintiff and moves the court for leave to amend the

petition in this cause, to which the defendant objects. And, on motion, the cause is continued, and the motion for leave to amend is continued under advisement.

And afterwards, to wit, at a term of the circuit court of the United States in and for the district of Kansas, begun and held at Topeka, in said district, on Monday, the twenty-fourth day of May, A. D. 1869—present, Hon. Samuel F. Miller, judge; Hon. Mark W. Delahay,
40 judge; A. S. Thomas, clerk; C. C. Whiting, U. S. marshal; S. A. Riggs, U. S. dist. attorney—and on the 26th day of May, A. D. 1869, proceedings were had in said cause in the words and figures following, to wit:

Wednesday, May 26, 1869.

E. W. KINGSBURY
vs.
SHOEMAKER, MILLER & Co.

Now comes the plaintiff by A. H. Case, his attorney; the defendant, by Hurd & Stillings, their attorneys, and the motion heretofore made to amend the petition herein being heard is by the court sustained, and the plaintiff is hereby granted leave to amend the petition herein, agreeable to said motion, upon payment of all costs to the present term, and, on motion of defendants, this cause is continued to next term.

41 And afterwards, to wit, on the 26th day of May, A. D. 1869, the said plaintiff filed in the office of the clerk of said court his amended petition; which is in words and figures as follows, to wit:

In the circuit court of the United States, sitting in and for the State of Kansas.

E. W. KINGSBURY, PL'FF,
vs.
ROBERT M. SHOEMAKER, & MILLER, whose first name is unknown, def't. } Petition.

The said E. W. Kingsbury, the plaintiff, complains of the said Robert M. Shoemaker, & Miller, whose first name is unknown, partners, doing business under the firm name of Shoemaker, Miller & Co., defendants, for that the said defendants, before and at the time of the committing of the wrongs and injuries hereinafter stated, were the contractors for building the Union Pacific Railway, Eastern Division, running from the State line between Kansas and Missouri west to the terminus, viz: In the vicinity of Fort Hays, some 165 miles west of the town of Ellsworth, Kansas.

That portion of the said railroad built west of Ellsworth was
42 used by these defendants for the purpose of running their construction trains, and of transporting material for building the said railroad further west, and also for the purpose of transporting passengers and baggage over and upon said railroad, to the end of the track, as far as laid, for certain hire and reward; & thereupon the said pl'ff, on the 8th day of October, A. D. 1867, at the special instance and request of said defendants, and in the cars thereof, to be safely carried from Ellsworth to Walker's Creek and return to Ellsworth, for

a certain hire and reward to the said defendants in that behalf. And the said pl'ff was then received by the said defendants in the cars and on the railroad aforesaid, as run and used by the said defendants exclusively, as such passenger, to be carried thereby as aforesaid.

Yet the defendants, not regarding their duty in that behalf, and, by their servants and agents, so carelessly, negligently, and unskillfully conduct the running aforesaid cars and railroad, that on the 8th
43 day of October, A. D. 1867, by the carelessness and negligence and default of said agents & servants, and for want of due care and attention to their duty in that behalf, and without any fault, neglect, or carelessness on the part of said plaintiff, the said car was run off the track of said railroad, whereby the said plaintiff was greatly cut, bruised, and wounded, and the left arm and left side and shoulder of him, the said pl'ff, was injured so that the said plaintiff became and was sick, lame, and unable to walk for some time, and was unable to use his left arm, and was wholly unable to attend to the transaction and performance of his usual and necessary business, and so continued from thence hereto; and said plaintiff has been put to great expense, to wit, to the sum of $1,000, in endeavoring to cure his said wounds, bruises, and fractures, to the damage of this plaintiff in the sum of $20,000.

Wherefore plaintiff prays judgment against the defendants for
44 the sum of $21,000, his damages so as aforesaid sustained.

J. L. PENDERY,
KUNKLE & BLAKE,
Atty's for Pl'ff.

Which said amended petition is endorsed in the words and figures following, to wit:

No. 141. E. W. Kingsbury vs. R. M. Shoemaker et al. Petition. Filed May 21, 1868. A. S. Thomas, clerk. Pendery & Kunkle & Blake.

Which said amended petition is further endorsed by the clerk of said court with filing in words and figures as follows, to wit:

Filed May 26, 1869. A. S. Thomas, clerk.

And afterwards, to wit, on the 3d day of June, A. D. 1869, there was filed in the office of the clerk of said court, by the said defendants, their answer to the amended petition of the said plaintiffs; which answer is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *District of Kansas:*

In the circuit court of the United States for the district of Kansas.

45 E. W. KINGSBURY
vs.
R. M. SHOEMAKER, & MILLER, WHOSE first name is unknown, partners as Shoemaker, Miller & Co. } Answer to amended petition.

And now come the said defendants, and for answer to the amended petition in this cause deny generally and specifically each and every allegation of said amended petition, and each and every part thereof.

HURD & STILLINGS,
Attorneys for Defendants.

Which said answer is endorsed in words and figures as follows, to wit:

No. 141. E. W. Kingsbury vs. Shoemaker, Miller & Co. Answer to amended petition. Hurd & Stillings, def'ts att'ys. Filed June 3, 1869. A. S. Thomas, clerk.

And afterwards, to wit, at a term of the circuit court of the United States of America, in and for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday the 22d day of
46 November, A. D. 1869—present, Hon. Mark W. Delahay, judge—and on the 26th day of November, A. D. 1869, proceedings were had in said cause and appear of record in the words and figures following, to wit:

Friday, November 26, 1869.

E. W. KINGSBURY
vs.
ROBERT M. SHOEMAKER, MILLER, WHOSE first name is unknown, partners, doing business under the firm name of Shoemaker, Miller & Co. } 144.

This case being called for trial, now comes the said plaintiff and his attorneys, J. L. Pendery, A. H. Case, and Byron Sherry, and the said defendants by their attorneys, J. P. Usher, T. A. Hurd, and E. W. Dennis, and announced themselves ready for trial; thereupon came a jury, to wit, Golden Silvers, A. W. Pliley, David Naylor, N. P. Horton, George McCarter, A. M. Cavell, John Porter, N. R. Beckell, N. Foss, H. C. Lindsey, W. C. N. Garvey, and John G. Hewitt, twelve good
47 and lawful men of the body of the district of Kansas, who, being duly empannelled and sworn well and truly to try the issues joined and matters submitted to them, and a true verdict give according to the law and the evidence, and the trial not being concluded at the hour of adjournment, the jury are admonished of their duties herein, and the further hearing of this case is postponed until to-morrow morning.

And afterwards, to wit, at the said term of said court, and on the 27th day of November, A. D. 1869, proceedings were had in said cause and appear of record in words and figures as follows, to wit:

Saturday, November 27, 1869.

E. W. KINGSBURY
vs.
ROBERT M. SHOEMAKER, MILLER, WHOSE first name is unknown, partners, doing business under the firm name of Shoemaker, Miller & Co. } 141.

48 And now come the parties herein, same as yesterday, and the jury being called, and all being present, the trial is proceeded with; the evidence in the case, being produced and concluded, and the instructions given to the jury by the court, and the argument of the case being heard and concluded, and finally submitted to the jury, who retire, under

charge of a sworn bailiff, for deliberation, who afterward are conducted into open court, under charge of their said sworn bailiff, and answered to their names called by the clerk, and render their verdict in the words and figures as follows, to wit:

"E. W. KINGSBURY
"*vs.*
"SHOEMAKER, MILLER & Co.

"We, the jury, find for the plaintiff, and assess his damages at $16,041 66⅔.

"GOLDEN SILVERS, *Foreman.*"

And thereupon the said defendants, by their attorneys, gave notice of a motion for a new trial.

And afterwards, to wit, on the said 27th day of November, A. D. 1869, there was filed in the office of the clerk of said court a ver-
49 dict of the jury, which is in the words and figures following, to wit:

E. W. KINGSBURY
vs.
SHOEMAKER, MILLER & Co.

We, the jury, find for the plaintiff, and assess his damages at $16,041 66⅔.

GOLDEN SILVERS, *Foreman.*

Which said verdict is endorsed in the words and figures following, to wit:

No. 141. E. W. Kingsbury vs. Shoemacker, Miller & Co. Verdict. Filed Nov. 27, 1869. A. S. Thomas, clerk.

And afterwards, to wit, on the 29th day of November, A. D. 1869, the defendants filed in the office of the clerk of said court a motion for a new trial herein, which is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *District of Kansas:*

In the circuit court in and for said district.

E. W. KINGSBURY
vs.
R. M. SHOEMAKER & MILLER, PARTNERS as Shoemaker, Miller & Co. — Motion for a new trial.

50 And now comes the defendants and moves the court for a new trial of this cause, and specify the following grounds and reasons therefor:

First. Irregularity in the proceedings of the court, jury, and plaintiff, by which the defendants were prevented from having a fair trial.

Second. Misconduct of the jury, and the plaintiff, the prevailing party in said trial.

Third. Accident and surprise, which ordinary prudence could not have guarded against.

Fourth. Excessive damages, appearing to have been given under the influence of passion or prejudice.

Fifth. Error in the assessment of the amount of recovery, and that the amount of the recovery is too large, and not warranted by the evidence.

Sixth. That the verdict is not sustained by sufficient evidence, and is contrary to law.

51 Seventh. Newly-discovered evidence material to the defendants, which they could not, with reasonable diligence, have discovered and produced at the trial.

Eighth. Errors of law occurring at the trial and accepted to by the defendants.

And notice is hereby given that affidavits will be read on said motion.

J. P. USHER,
T. A. HURD,
Att'ys for Def'ts.

Which motion is endorsed in words and figures as follows, to wit:

E. W. Kingsbury vs. R. M. Shoemaker et al. Motion for new trial. J. P. Usher, T. A. Hurd, def'ts' att'ys. Filed Nov. 29, 1869. A. S. Thomas, clerk.

And afterwards, to wit, at the said November term, 1869, of said court, further proceedings were had in said case, and appear of record in words and figures as follows, to wit:

52 Monday, November 29, 1869.

E. W. KINGSBURY
vs.
ROBERT M. SHOEMAKER & MILLER, whose first name is unknown, partners, doing business under the firm name of Shoemaker, Miller & Co. } 141.

Now comes the said plaintiffs by his attorneys herein, and the said defendants by their attorneys herein; and the defendants' motion for a new trial, and the reasons therefor, filed herein, called for hearing, which, not being concluded at the hour of adjournment, is postponed until to-morrow morning.

And afterwards, to wit, at the said November term, 1869, of said court, further proceedings were had in said case, and appear of record in words and figures as follows, to wit:

53 Tuesday, November 30, 1869.

E. W. KINGSBURY
vs.
ROBERT M. SHOEMAKER & EDWARD MILLER, partners as Shoemaker, Miller & Co., defendants. } 141.

And now come the parties by their attorneys, Pendery, Case, & Sherry, for plaintiffs, and Usher & Hurd, for defendants; and the argument

of the defendants' motion for new trial being considered and submitted, is by the court overruled; to which ruling of the court defendants except. And the defendants move in arrest of judgment, which motion is by the court overruled; to which defendants except.

It is therefore considered and adjudged by the court that the said plaintiff, E. W. Kingsbury, have and recover of and from the said defendants, Robert M. Shoemaker and Edward Miller, partners as Shoe-
54 maker, Miller & Co., the sum of sixteen thousand and forty-one and sixty-six and two-third cents, ($16,041 66⅔,) and the costs by him expended in said cause, taxed at ; and that execution issue therefor.

55 And afterwards, to wit, on the 30th day of November, A. D. 1869, there was filed in the office of the clerk of said court a bill of exceptions, which is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *District of Kansas:*

In the circuit court in and for the district of Kansas.

E. W. KINGSBURY
vs.
R. M. SHOEMAKER, MILLER, COPARTNERS as Shoemaker, Miller & Co.

Be it remembered that, on this 26th day of November, A. D. 1869, this cause came on for trial before the court and a jury; the Hon. Mark W. Delahay, judge of the district court of the United States in and for the district of Kansas, presiding.

And the plaintiff, to maintain his case, presented himself as a witness.

E. W. KINGSBURY, being sworn, testified as follows:

"I am the plaintiff in this case. In October, 1867, I resided at Ellsworth, in the State of Kansas; was sheriff of the county, and
56 deputy United States marshal. I received an injury about that time. I was going from to Wilson's Creek or Walker's Creek to arrest one Playter, and getting five mules that Playter had. On the morning of the 8th of October, with two men, I got into a caboose car, on a construction train, and told Calkins"—

The defendants' attorneys objected to any conversation between the witness and Calkins, on the ground that the same incompetent, immaterial, and irrelevant; which objection was overruled by the court. To which ruling the defendants then and there excepted.

And the witness testified:

"I told Calkins I wanted to go to Fossil Creek, and then to Walker's Station, and then back to Ellsworth. An accident occurred. A crash came and I was thrown out. I remember nothing further. The cars were running very fast; it was about dark. We were going east. There were a number of passengers on board the train. It was thirty-eight hours before consciousness was restored. I first called Doctor
57 Wellington to attend me, and afterwards called Dr. Mott. I know Shoemaker, of the firm of Shoemaker, Miller & Co. He had a car on the road on which he was living. It was a passenger car, fitted up so he could live in it; and was moved from place to place along the line as the work progressed. He was building the road from Ells-

worth west, and track was laid to Walker's Creek, some 55 miles west, at the time of the accident. I saw Shoemaker nearly every day. He had charge of building the road. I saw Shoemaker's car often. He kept it at the front most of the time. Calking, Ferris, and others were conductors on the construction and material trains used by Shoemaker in carrying materials for the road. I know that conductors went round collecting fare of persons who rode on these trains. I rode on these trains a few times without paying fare. I had made the trip up and back three or four times before the accident. This was the only trip I made with Calkins. I had two men with me, and wanted to go to Fossil Creek. I think I paid Calkins twenty dollars at the time. I paid him the balance of the fare, amounting to $31 50, a few days
58 after the accident, and took his receipt for that amount. I have been under treatment of a physican ever since. I have not kept no account of the expense caused by the injury. It has cost me a good deal of money, in the neighborhood of one thousand dollars. I was in good health; physically as good a man as in Kansas. I received injury in my shoulder and internally, and a wound in the arm. My arm is not of much use to me; when I move my arm and turn it it causes pain in the shoulder. I cannot do the same labor now that I could before. A call of nature has to be attended to immediately; that trouble has continued until now."

The attorney then requested the witness to exhibit his arm and shoulder to the jury, which he refused to do, saying that he did not think it necessary to make an exhibition of himself.

"When we went up I rode on the engine; the engine was then in front, with caboose in the rear, and the rest of the train was flat cars loaded with railroad iron and other material for building the road.
59 When we got to Walker's Station the train was switched, and the engine hitched to an empty train with the engine tender forward; first, caboose, and the rest of the train, empty flat cars. The train returned with the engine running backwards, with the tender first. The tender was ahead and caboose next when the train was made up, and it was so run until the accident happened. William Convers was the engineer on this train. I rode on the engine a part of the way up. Calkins was in the caboose car at the time of the accident. I don't know that there were any lights or lanterns on the train. I know that on other trains they had a box-car in front of the engine, with the conductor on top of the car to give signals. I once saw the train so made up. It was between daylight and dark that the accident happened, and about three miles west of Ellsworth. It was about six o'clock. I was up at the front ten days before; knew nothing of the turn-table to turn engines on there, or west of Ellsworth. I was a part of the time in the caboose going up, and a part of the time on the engine. There was a partition in this caboose; the front end was
60 partitioned off. There was no door in front or rear, but sliding doors on each side; there was no window in the front end of the car; there was a door about the middle of this partition. At the time of the accident I was sitting in the front part of the caboose with my left hand on the door knob. I could not see forward toward the engine except from the side door. At the point of the accident the road run east and west in a straight line, some half a mile west of the place of the crash. I heard a rumbling noise, and soon after the car jostled, and I was thrown through the partition door, and out the side door of the car to the ground, and was injured."

On his cross-examination witness testified:

"There was a partition across the center of the caboose, making two rooms of about equal size. I was in the front room next to the engine; no other door leading out of this room than the door in the partition; was no window in the room. I could see nothing on the track nor the engine, unless I looked out of the side door. I could not have seen the engine, unless he was looking out of the side. I could not see whether
61 there was any watchmen out or not. No side door opened out of the room I was in. Partition door was not shut; had my left hand on the door knob trying to keep it shut or steadying myself. Calkins sat near reading a newspaper. I sat next to the door, and Playter next to me. I was sitting near the partition; was facing south, with my hand on the door knob. It was 2½ feet from me to the door. The car was 10 or 12 feet feet wide, and the door was about the middle of the partition.

"After the accident, the next I knew I was at my house. I can't say that I did not walk from the cars to my house. I shot myself in the foot after this. Met Calkins a day or two at his office in the car, and paid him the balance of my fare, and took a receipt from him. It was a few days after I was hurt that I got the receipt. I did not tell Calkins that I had not got the money, and that I would pay him when I came back.

"Had been up the road several times, and saw how the returning trains were made up. On one occasion before, I knew the engine
62 was reversed when we came back. We got to Walker's Station [Station] some time in the afternoon; staid but a short time. At Walker's Station the train was switched, and the engine placed backwards, with the caboose next. They stopped on the way up for me to arrest a prisoner, and I had him in the caboose. The down train always run the same way; sometimes with a box car in front of the engine. Walker's Creek is some 50 or 55 miles west of Ellsworth. Knew how the train was made up at Walker's Creek, and was run afterwards. I do not recollect that I testified on a former trial that I did not know how I got out of the car. I used my hand playing cards last night."

MOTT, sworn as a witness for pl'ff, testified:

"I am a physician; have been since May, 1867. I know the plaintiff. Know R. M. Shoemaker; knew him while he was building the railroad Was in Ellsworth in November, 1867. Saw the engines on the trains west of Ellsworth. Sometimes they went with engine foremost, sometimes it was backing. In the latter part of November, 1867, the
63 plaintiff came to me at my office to be examined. I had not seen him before; had never examined him before. I found he was suffering from his left arm and shoulder; was unable to move his left arm. And I found bruises on hips. I have attended him from that time to now. Knew him before the accident. He seemed to be in good health. It was his left arm that was injured. He has improved some since that time. He has lost the use of his left arm. His other troubles are unpleasant. I think the arm will waste away, and he will probably have good use of it again. He has difficulty in holding his urine and fæces. I think this was caused by some injury. I do not know whether the injury he received would produce the injury to them organs. I believe that there are some of the bones of the back that press upon these organs or the nerves. Internal injury would produce this effect. I don't know whether this injury would produce this injury. His involuntary evacuations were produced by an injury, according to my theory

of the case. I don't think he will entire recover from this injury. He has improved somewhat under my treatment."

On his cross-examination the witness testified as follows:

64 "Plaintiff first came to me in the latter part of November, 1867. I then examined him. I commenced practice in May of that year. Had had no surgical experience at the time he came to me. There was no displacement of any of the bones. I examined him again in June, 1868; I dressed his wounds. I have examined him several times since; the last time on Thursday last. I have never seen him use his arm. Have had no experience before with strained muscles. I did not see that any of the bones were displaced. I would know if the bones had been displaced. I think a ligament was ruptured. I know nothing about his internal injuries, or of his involuntary evacuations, except what he told me. I think the ligament that goes over the shoulder and binds the collar-bone to the shoulder-blade was ruptured. These internal injuries might arise from other causes as well as injuries. Intemperance might produce it. I graduated at the Ann Arbor Medical College, and came from there direct to Ellsworth. I staid there from May, 1867, to Jan'y 10th, 1868. I went from there to New Mexico, and
65 returned in June, and remained there until August, and then removed to Kansas City, where I have since resided. The defendant moved to Kansas City about a year ago. I examined the pl'ff the 3d time in November last; the next time in December or January, 1868, or 1869. I examined him again in May or June last, and the last time last week. I prescribed for him. I made a linament for the external injuries—something soothing. The basis of all those prescriptions was chloroform. I don't know how many times I have prescribed for him. I have prescribed for his internal difficulty. Have given strichnine, phosphorus, and cyanate of potassium. These were taken internally. I think he is not regular in his habits; is somewhat intemperate. He has had no other physician but myself, to my knowledge. I know he shot himself, but did not treat him for that."

On his re direct examination witness testified:

"I discovered these bruises I have spoken of some five or six weeks after the accident. I am a practicing physician in Kansas City now. The plaintiff moved to Kansas City in December last."

66 McGRATH, witness for the plaintiff, sworn for the plaintiff, testified:

"I know R. M. Shoemaker. Shoemaker introduced me once to Mr. Miller. Don't know that he was Miller, the defendant. I was on the track. I was an engineer in charge of portions of the work."

FRANK CALKINS, sworn as a witness for the plaintiff, testified:

"I know defendant Shoemaker, and know he was a member of the firm defendants. Don't know Miller, nor where he lives. Was conductor on the train when the accident occurred. The lettering on the cars was R. M. S. & Co., S. M. & Co., and U. P. R. W., E. D."

J. P. USHER, sworn for the plaintiff, testified:

"Know Shoemaker, Miller & Co. The members of the firm was R. M. Shoemaker, Edward Miller, S. M. Edgell, J. N. Kinney, C. S. Greeley, and, I think, some one else in St. Louis. All of these defendants are non-residents of Kansas."

WILLIAM SMITH, sworn for plaintiff, testified:

"Resided in Ellsworth in 1867. Have seen Shoemaker. Went from

Ellsworth to Hays in Sept. or Oct., 1867. Paid fare to the con-
67 ductor. James Cross was conductor. I went in the caboose; there some 4 or 5 passengers."

On his cross-examination:

"The road was finished to Hays. It was about the first of October that I went. This was the only time I ever went."

TOBIN, sworn as witness for pl'ff, testified:

"I lived in Ellsworth in 1867. In October, 1867, I went from Ellsworth to Hays. The conductor collected fare of me and other passengers."

On his cross-examination witness testified:

"This was the same time Smith went up. I went with Smith, the former witness. The car was a passenger car, and run through to Hays City. Except the passenger car, the train was made up of flat cars. There were no box cars in the train. It was a regular passenger car, with cushioned seats."

WHITNEY, a witness for plaintiff, being sworn, testified as follows:

"I lived in Ellsworth in 1867; have ridden on construction trains; paid my fare; don't remember how many times I have ridden. Other passengers paid their fare. Usually rode in caboose; was in Ellsworth when Kingsbury was hurt; saw him same night. He was lying
68 on a cot on the top of the seats in the car when I first saw him; he was carried home in a chair. Myself and one Rowe carried him; think he was not conscious when we carried him home. He was confined to his house some five or six days. Then he did not put on the sleeve of his coat, and did not for some five or six weeks; was deputy sheriff under plaintiff. He could not attend to business much for five or six weeks."

The plaintiff then rested his case.

The defendants then called as a witness—

FRANK CALKINS, who testified:

"I was the conductor on the train on which accident occurred mentioned by plaintiff. My train that day consisted of flat, iron, and material cars, water tanks, with a caboose car attached. I took my loaded train to Walker's Creek, and there exchanged it for a train of empty cars, and with the same engine and caboose returned to Ellsworth. The accident occurred on the return trip. Walker Creek is some 50
69 miles west of Ellsworth. I went with my train to Wilson Creek side track. There was no means of turning the engine west of Ellsworth. This was some 8 miles east of Hays. The plaintiff received his injury before the train ran off the track. I saw the plaintiff in the morning, before we started from Ellsworth. He told me he wanted to go up the road, and asked me if I would stop the train for him to arrest a man; said he wished to go up as far as Wilson's Creek. He road on the engine. We stopped for him, and he found and arrested the man he was in pursuit of. He paid me some six or seven dollars, and said he would pay me the balance when he got back. When we got to Walker's Creek, I sent my cars on the side track, engine 1st, caboose next, and eighteen flat cars, the engine heading west. We left there, to return, about two o'clock p. m. The caboose was pushed along on the track by myself and my train men to make up the return train, and the engine placed in front, tender foremost, and the flat empty cars making

up the return train. I don't know whether the plaintiff was in
70 the caboose at the time we made up the train. The locomotive was before the tender; was put before the caboose at Walker Creek. There was nothing to prevent a person from seeing how the locomotive was place and the train made up. There was no bank or other obstruction there. It was an [an] open prairie. I have been a railroad conductor since 1861, and have been a railroad man since 1855."

The defendant's counsel then asked the witness this question:

"Question. What was the safest way to run that train back to Ellsworth?"

Which question was objected to by the plaintiff. The court then sustained the objection, and refused to the questioned to be asked the witness or answered by him. To which ruling of the court the defendant then and there duly excepted.

The witness then further testified:

"On the return trip the locomotive was run tender first, and the caboose next to the engine. The train could not have been made up
71 and run in any other way. There was no means west of Ellsworth by which the engine could have been turned. There was no turntable on the road west of Ellsworth. We run these trains from 12 to 15 miles per hour. There were no other than construction trains west of Ellsworth at that time. The road was being built, and was not completed. The train could be safely run at a speed of fifteen miles an hour. This train was not run too fast for safety. This was the ordinary and usual speed of the train. I had run this train some two or three months before the accident. This train was not running faster than usual at the time of the accident. I never run my train with a box car in front of the engine. The trains are never so run, except when there is a blockade on the track, and we are compelled to so run. It is not as safe to run a train with a box car in front of the engine. The car obstructs the view of the engineer. The safest way to run a train is with the engine first, with the pilot forward. This train could not have been turned. It was run the safest way possible under the circumstances. There was no means of turning this engine west of Ellsworth. William Con-
72 vers was the engineer, and Willis Convers was the fireman on this train. Myself and three brakesmen were on the train. The number of brakemen was sufficient for the safe management of the train. At the time of the accident (at about six o'clock the accident occurred) the train was running at from twelve to fifteen miles per hour. I was sitting in the forward end of the caboose car, with a lantern on my arm, reading a newspaper. The first I knew that anything was wrong was a rumbling noise and escaping of steam, and directly came the bumping of the car. There was a window in the front end of this car, nearest the engine. I was sitting within two feet of the end, near the window, in the front end of the car. I had been in that car, off and on, all the way down from Walker's Creek. The plaintiff was in the same room with me at the time of the accident. He had been there all the way down; was sitting on a box or an apple-boy's trunk. The partition of the car was east or front of the side doors. A little more than a third
73 was partitioned off. The door was perhaps two feet from the south side of the car as it was then running, headed east, and was nearest to the south side. I sat back toward the window facing the door. The trunk was near the door, by the partition; was there imme-

diately before Playter, who was with Kingsbury as his prisoner. The plaintiff was facing south. As soon as the rumbling noise commenced, the plaintiff jumped up, and went out of the room. I saw him go out. Nothing had occurred at the time he went out to throw him out. At the time he went out the caboose was not off the track. We found him four to seven car-lengths back from where the caboose stopped. The track was not disturbed at the place where we found him. The caboose did not upset. Flat cars with couplings will range about thirty feet in length. When the caboose stopped, there were no trucks under it. It was right side up on the track. Nothing occurred to tip a man out of the car before the plaintiff left the room. I think he jumped out, and Playter followed him out, and was found partly under the cars. The locomotive and tender was upset off the north side of the track.

74 "We took the plaintiff into the caboose, and gave him some water. I sent a train hard to Ellsworth, and a train came up and took the wounded to Ellsworth. The brakeman were back on the train at the time of the accident. No one was hurt who stayed in the car. There some soldiers on a rear flat car. Playter went out of the caboose after Kingsbury. It was a wild country, and there were no settlements there. I had never seen any one there, nor about there, before that time. I had never seen any cattle in that vicinity—saw a couple of buffalo on the hills once—nor anywhere about there before that time. After the accident I saw a camp-fire on the opposite side of the river. I think I saw a fire over there. Soon after the accident a man came over and claimed that the ox run over, that threw off the track, belonged to him. Only one man came over. The grass about there was bottom grass, some five or six feet high; as high as an animal standing up. Was as high as a common work animal driven in a team. It was a moonlight night. The moon was in about

75 three-quarters. It was about six o'clock. It was not practicable to put any light on the engine or the forward part of the tender. The light would not do any good. One could see better without it. Could not see as well in a moonlight night with a light or lantern on the forward part of the tender as it was running. The track was in a good condition. The train made no uncommon noise. The engineer can see as far as the man on the tender can see. When a box-car is run in front of the engine, the man on the car is then on the lookout to signal the engineer. The light he carries at night is for the sole purpose of giving signals to the engineer. The light is useless for any other purpose than to use as a signal. I saw the plaintiff within three days after the accident. I saw him at my office in the car at Ellsworth. He came to pay me the balance of the passage-money. He had paid me six or seven dollars before, and he paid me the balance then, and gave him a receipt. I asked him how he was, and he said he was feeling lame and sore. He was alone. One Scott was with me. He made no complaint about the accident. He said he had come in to

76 pay the balance of the fare. I had not seen him before after the accident. I did not send for him."

On his cross-examination witness testified:

"I do not remember all that was said at the Kingsbury came to the car. I don't remember that the plaintiff what he wanted the receipt for. I don't remember anything about the receipt. (Receipt presented to witness.) I signed this receipt."

On his re-direct examination witness testified:

"There was no accommodation for passengers in the caboose car.

The caboose car was for the accommodation of the train men, for tools, lamps. The train men slept in the car. We had bunks, mattrasses, &c. It was for the accommodation of the train men alone. When persons got on to ride we did not put them off. Did not wish to carry passengers. After the road was completed and turned over to the company, passenger trains and cars were put on."

On his re-cross-examination witness testified:

"I am under the impression that I stated the amount Kingsbury first paid me correctly. When he came to the car to pay the balance of the fare he had his coat thrown over his shoulder, his left arm in a
77 sling, and carried a cane in his right hand. The flat cars on the down train were all empty. We had then on the track three engines west of Ellsworth. I made a trip from Ellsworth every day. Sometimes we had passengers, and sometimes none; sometimes one, two, three, or a half-dozen. The engine was thrown from the track, on the north side of it. We found the plaintiff on the south side of the track, in the ditch. The ditch was two or two and a half feet wide. The brakesmen were at their posts. There was a door in the rear end of the caboose. I don't know that the conductors on the other trains carried passengers. The coaches connected with the cars at the end of the track. I recognized no through tickets. I do not know whether [whether] any one would have been hurt if the caboose had been at the end of the train. The caboose would not have gone off the track if it had been placed at the rear."

On his further re-direct examination the witness testified:

"The caboose was run in the same way as on this occasion all
78 the time. I quit work for the defendants about the middle of November, 1867. About July 1, 1868, I went into the employ of the Union Pacific Railway, Eastern Division, as conductor, and am operating a construction train now. The plaintiff had not ridden on my train before this time. The construction trains were all run in the same way as mine. The passengers rode where they pleased on the trains. Sometimes on top of loads of iron or ties. Sometimes we had no caboose attached to the train, and the passengers road on the flat cars. I don't know whether both side doors of the caboose was open at the time of the accident."

WILLIAM CONVERS was produced and sworn as a witness and the part of the defendants, and testified as follows:

"I reside at Wyandotte, Kansas, and have lived there nine years last past. I am a locomotive engineer, and have worked at that eighteen months or more. I was fireman on an engine before I was engineer. I have been railroading about four years, and have been engineering over two years. I was the engineer on the locomotive of
79 the train when the accident occurred. We left Walker's Creek Station, to return, about two or three o'clock in the afternoon. We usually run about fifteen miles per hour. The road had been surfaced up and was in good order, and I was well acquainted with it. I had been over it every for some time. My engine, number 18, was in good condition. I had never seen any cattle along the road in the vicinity of the place of this accident before. I never saw any camps about there. I did not see any man there claiming the steer killed, after the accident. This accident occurred just after dark. I could see down the track three or four hundred yards plainly. I could distinguish an animal on the track at that distance. It was a moonlight night. This an-

imal seemed to come from the south side of the track. I did not see him pass the ditch on the south side. He was about twenty feet from the end of the tender when I first saw it. The accident occurred from running over this steer. Had he been on the track, I could have
80,81 seen him at least two hundred yards away. He appeared to come on the track from the south side. I think I did not blow the whistle. I was struck on the head. I do not know what struck me. My brother, who was fireman, undertook to put on the brake on the tender. When he saw the steer he tried to put on the brake. I don't remember that I heard my brother call out anything. He undertook to put on the brake. As he did that the tender went down upon the ties. I was sitting on the seat in the cab of the engine with my head out of the side-window, looking down the track. My left hand was on the window-sill and my right hand on the lever of the cut-off. As soon as I saw the animal I shut off the steam, and seized the lever to reverse the engine, and had it about half over when the engine went off the track. Something struck me on the head and I did not know anything more. I was injured. I did what I though was best to be done to stop the
82 train. The whistle lever was in the top of the cab. I did not whistle for brakes. I had no time to do so after I saw the animal and before the engine went off the track. My brother went to the brake about the time I got off the seat. Kingsbury rode on the engine a part of the time while we were going up that morning. I did not see him while were making up the train. I had nothing to do with making up the train. The train was in charge of the conductor. I run with Ferris sometimes. When the tender is in front there is no use for a light upon . A light would not assist in seeing down the track. I had never seen cattle along that line before.

"Question. How were these construction trains usually made up?"

Question objection by the attorneys for the plaintiff, and the objection was sustained by the court; to which ruling the attorneys for the defendants then and there excepted.

The attorney then asked the witness the following question:

"Question. How were the other trains on this road usually made up and operated?"

Which question was objected to by the defendants' attorney,
83 and was sustained by the court. To which ruling of the court the defendants' attorney then and there duly accepted.

The witness further testified as follows:

"The caboose was never put on the rear of the train in coming east on the road. All the locomotives were headed westward, as the loaded trains were all that way; and all run backwards on returning east. There was a window in the end of this caboose car, next to the engine. It looked out upon the front of the engine. There was nothing to prevent any one from looking out upon the front of the engine. There were three brakesmen on this train. This was a full complement of brakesmen on this train. They ought to have been on the train. There was no time to give a signal for brakes after I saw the animal and before the locomotive went off the track. That train could have been stopped at the speed it was running in about one hundred and fifty yards. When danger appears, the first thing to be done is to reverse the engine and then sound the whistle for brakes. Both could not be done at the same time. In order to reverse and blow the whistle
84 two motions are necessary—first, to cut off the steam, and then take hold of the lever to throttle valve and move it over. It

takes both hands to reverse. The whistle is sounded by a lever in the top of the cab. Brakemen would know, by shutting off steam and reversing, that something was the matter. It would take about ten seconds to do all this. I did it as quick as I could. I could have done nothing more than I did do."

On his cross-examination the witness testified:

"I first ran an engine in the yard of the Union Pacific railroad, in Wyandotte, in 1867; was there about five months; made up trains; run around over to the State line. Had been on an engine seven or eight months before I went up on this road. I had run on the road from August until after the accident. I cannot tell how long we were at the side track. I did not see plaintiff at all after the accident. I had run on the train with Ferris as conductor."

COOK sworn as witness for the defendants, testified:

"I reside at Junction City, Kansas. I am superintendent of
85 engines and engineers on the Kansas Pacific railway. I knew the last witness, William Convers, since May, 1866. In June, 1866, he was a fireman on an engine. In August, 1866, he was an engineer. He was mistaken in the time. I have been a locomotive engineer almost eighteen years. I know the capacity of William Convers as an engineer; in October, 1867, it was good; he was a competent engineer. He was in the employ of Shoemaker, Miller & Co. in 1866, and was there employed until March, 1867. There was such a firm as Shoemaker, Miller & Co. I think he was employed by them some six weeks in the fall of 1867. When danger approaches the first thing for an engineer, to shut of steam, the next to reverse, and third to sound the whistle for brakes. I was at Junction City at the time William was up above Ellsworth. I was up there several times and saw him there. Under the circumstances nothing more could be done by an engineer than Convers did do on that occasion. There was nothing else that could have
86 been done. It would take an engineer about ten seconds to do all that I have described. As Convers sat in the window of the cab his head would be about ten feet above the rail. I have made a calculation of the distance. The rear of the tender was at the top, and was about seven feet above the rail. From the place where Convers was the line of vision would strike the rail of the track about forty feet beyond the tender. The engines Shoemaker, Miller & Co. used were the Rogers engine. They were as good as any, if not the best."

On his cross-examination the witness testified:

"The engineer had not got half done what I have mentioned for him to do when the tender and engine went off the track. The usual course of making engineers is for them to act as firemen upon the engine until they become familiar with the engine, and the manner of handling it. All engineers are first firemen. William Convers got the same pay I did, and was considered a competent engineer."

WILLIS CONVERS, sworn as witness for the defendants, testified:

My age is 20 years; am a brother of William Convers, former
87 witness. In October, 1867, I was firing engine number 18 for Shoemaker, Miller & Co., running from Ellsworth west to the end of the track. At the time of the accident I was standing in the tender on the lookout down the track. I had just before put wood into the engine; there was but little wood in the tender. I saw a steer jump from the high weeds on the south side of the track upon the track, about twenty feet from

the tender. I called to my brother to look out that there was a steer on the track. I saw him jump across the ditch upon the track. I did see the steer before he made the leap upon the track; think it was dark color. It was just after dark; was a bright moonlight night. I could distinguish an animal two hundred yards or more down the track. The weeds came up to the ditch, and were four or five feet from the ends of the ties. The weeds were tall sunflower weeds, five or six feet high. I was standing on the tender near the gangway, about three feet from the engine. When I first saw the steer was leaned over, looking down the track; was on the lookout. I had never seen any animal along the line before. I was keeping watch. I was to keep watch on the
88 south side of the engine. I had been there three or four minutes, and was then keeping watch. I had never seen cattle there or about there before. I saw no man come for the cattle that night. As soon as I saw the steer I jumped for the brake on the tender, and had turned it partly around when the tender went off the track. I then stepped upon the engine. I just had time to take about two steps after I saw the animal. I just got into the cab as the tender went over. I had run as a brakesman for more than a year before I was fireman, and had been firing for more than a month before this accident. When I looked at my brother, after I saw the steer, he was reversing the engine."

On his cross-examination the witness testified:

"I was brakesman on this train before I was fireman. It was about dark when we struck the steer. The track was straight for about a half a mile ahead, and it was a quarter or a third of a mile back to a curve. It was about three miles west of Ellsworth. I have been railroading since about the fourth of March, 1866; know where the place of
89 brakesman is. I could not tell the color of this animal. I saw his remains after the accident. They were badly mangled and torn. I did not testify on a former trial that I saw two steers, one leap the track."

THO'S BROGHAM, sworn as a witness for the defendant, testified:

I was a brakesman on the train in question. It was about dark when we struck a steer about three miles west of Ellsworth. I was on the rear car at the time. I had been running as brakesman since the fourth of March, 1866, till June, 1868. I know where the places of brakemen are on the train. At the time of the accident they were in their places. I heard a rumbling noise, and felt a shock of the cars. I set the brakes on the rear car; went to the next car and set the brake, when the train stopped. The train run ten or eleven car lengths after I heard the rumbling noise before it stopped. No signal was given. At the place of the accident wild sunflowers were standing at the side of the track higher than an ox. The weeds were very thick. They were about
90 four feet from the end of the rail. I had never seen any stock or cattle on the side of the river where the road is before. There seemed to be a camp on the south side of the river, opposite the road, some distance away. I noticed a light there before the crash. Saw the animal after it was run over. A man came over and claimed the ox was his."

The defendants here rested their case.

The plaintiff then recalled—

MR. KINGSBURY, pl'ff, who testified:

"The ox killed belonged to one Williams. He lived on the south side

of the river, four or five miles from Ellsworth. He lived nearer than two miles from the place of the accident, on the south side of the Smoky Hill River."

On cross-examination he testified:

"The only way I know the steer belonged to Williams was what he told me."

WHITNEY recalled:

"I know this section of the country. I know that stock ranged about there. This ox belonged to Williams, who lived on the other side of the Smoky Hill River, and over two miles from the railroad track. Dougherty had a ranch and stock on the south side of the
91 river; have seen cattle belonging to him up there. I don't know where the accident did occur. Williams had lived there since the spring of 1867. He lived about 4 miles from Ellsworth, on the south side of the river."

On cross-examination the witness testified:

"I did not see the steer, nor knew it belonged to Williams, except what he told me. No people lived near the railroad track on the north side of the river. The Buffalo range was some five or six miles from town. The wagon road was more than a mile from the railroad at the point of the accident. I had been on the railroad before the accident, and up the wagon road a dozen times. The wagon road was on the north side of the river. Dougherty's house was on the south side of the river nearer town than Williams'. Saw no cattle at Williams' when I was there. Was there in the fall. Have seen trains camped on the south side of the river. Williams was 4 or 5 miles off."

SANDERSON, sworn as witness for the plaintiff, testified:

"Lived in Ellsworth in October, 1867. Farming of land 3 or
92 4 miles from Ellsworth. Had stock up the valley in the fall. Was putting up hay there within about a mile of the railroad, across the river. Williams had a ranch about a mile from the road. He had two yoke of cattle. Don't know where they ranged. Commenced cutting hay about the first of September."

Cross-examined:

"I saw cattle on Turkey Creek, some 3 to 6 miles from where the accident occurred. I had horses and mules. They ranged in the bottom across the river. The other hay-men had horses and mules. Williams had four steers. He lived a mile from the railroad."

DELACOUR sworn as witness for plaintiff:

"I lived in Ellsworth in Oct., 1867. I am acquainted with that section of the country. Have seen cattle in that section in October and September, 1867. In May, 1867, I went to Hays. Saw cattle there then. I can't swear what distance the wagon road is from the railroad. Know where Williams' and Dougherty's ranches were. There were from
93 600 to 700 people in Ellsworth at that time. Trains came in with cattle, and they ranged around the country, 3 or 4 miles out from town."

Cross-examined:

"Went west from Ellsworth to some point. Went by railroad on a construction train. There were cattle on the road on that day; some

two or three miles from town. This was over two years ago. I cannot swear that I saw cattle near where the accident was."

The plaintiff then rested his case.

The foregoing is all the evidence in this cause, and because the same does not appear of record, the defendants present this their bill of exceptions and pray that the same be signed, and sealed, and made a part of the record, which is done.

[SEAL.] MARK W. DELAHAY,
Associate Justice of U. S. Circuit Court for the District of Kansas.

Which said bill of exceptions is endorsed in words and figures as follows, to wit:

No. 141. E. W. Kingsbury vs. Robert M. Shoemaker, &
94 Miller, whose first name is unknown. Bill of exceptions. Filed Nov. 30, 1869, A. S. Thomas, clerk.

95 And afterwards, to wit, on the said 30th day of November, A. D. 1869, the said defendants filed in the office of the clerk of said court their certain other bill of exceptions in the words and figures following, to wit:

E. W. KINGSBURY, PL'FF,
vs.
ROBERT M. SHOEMAKER, MILLER, WHOSE first name is unknown.

In the circuit court of the United States for the district of Kansas.

Be it remembered that, on the trial of this cause, and at the proper time, the plaintiff presented to and prayed the court to give in charge to the jury the following instructions, to wit:

"When it is proved that the car was thrown from the track and the plaintiff injured, it is incumbent on the defendants to prove that the agents and servants in charge of the train were persons of competent skill, of good habits, and in every respect qualified and suitably
96 prepared for the business in which they were engaged, and that they acted on this occasion with reasonable skill and with the utmost prudence and caution, and if the disaster in question was occasioned by the least negligence or want of skill or prudence on their part, then the defendants are liable in this action."

Which prayer the court granted and gave the instruction to the jury, and the defendants then and there excepted.

And be it further remembered that the defendants at the same time presented to and prayed the court to give in charge to the jury the following instruction to wit:

"When the facts are uncontroverted, the question of negligence is a question of law for the court. Now, the testimony is without contradiction, that the animal suddenly leaped on the track immediately before the advancing tender at a place where animals had not before been known to be and where there was no reason to cause the defendants or their servants to expect them to be; that it was so sudden, there
97 was not time for the engineer to do anything to stop the progress of the train; that the tender and locomotive running upon the animal were instantly capsized; that the plaintiff leaped or was thrown

from the caboose and was injured. Under such circumstances it must by the law be held to have been an unavoidable accident to the plaintiff, and the verdict should be for the defendants."

Which instructions ought to have been given if the same was correct in point of law. But the court overruled the prayer of defendants and refused to give said instruction in charge to the jury, and the defendants excepted, and presented this their bill of exceptions, and prayed that the same be signed and sealed by the judge and made a part of the record; which is done now here in open court.

[SEAL.] MARK W. DELAHAY,
Associate Justice of the U. S. Circuit Court for the District of Kansas.

Which said bill of exceptions is endorsed in the words and fig-
98 ures following, to wit:

No. 141. E. W. Kingsbury vs. Robert M. Shoemaker et al. Bill of exceptions. Filed Nov. 30, 1869, A. S. Thomas, clerk.

And on the said 30th day of November, A. D. 1869, the said defendants filed in the office of the clerk of said court another bill of exceptions in said case, which is in words and figures as follows, to wit:

99 E. W. KINGSBURY, PL'FF,

ROBERT M. SHOEMAKER, MILLER, whose first name is unknown.

In the circuit court of the United States for the district of Kansas.

Be it remembered that, upon the trial of this cause, and at the proper time, the pl'ff presented to & prayed the court to give in the charge to the jury the following instructions:

KINGSBURY
vs.
SHOEMAKER & MILLER.

The pl'ff asks the court to instruct the jury:

"1. That carriers who undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety re-
100 quire that they be held to the greatest care and diligence; and whether the consideration of such transportation be pecuniary or otherwise, the personal safety of the passenger should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well be termed 'gross.'"

"2d. The rule of 'respondeat superior,' or that the master shall[illegible] civilly liable for the tortious acts of his servants, is of universal application, whether the act be one of omission or commission, whether [illegible]ligent, fraudulent, or deceitful."

"If it be done in the course of his employment, the master is liable and it makes no difference that the master did not authorize or even know of the servants' acts or neglect; or even if he disapproved
101 or forbade it, he is equally liable, if the act be done in the course of his servants' employment."

E. W. KINGSBURY
vs.
SHOEMAKER, MILLER & CO.

The plaintiff respectfully asks the court to charge the jury:

"3. The undertaking or contract to carry passengers and liability of the carrier go to this extent, that he or his agent shall possess competent skill, and, as far as human care and foresight will go, he will transport his passengers safely."

"4. The carrier of passengers is liable only for negligence, but
102 the law adjudges that to be negligence in him which evinces a want of that degree of circumspection and foresight which very cautious persons exercise where the lives, limbs, and health of human beings are concerned. He is required to exercise extraordinary care, and is liable even for slight neglect."

"That the defendants are not liable in this action, unless the jury find that the injury, of which the plaintiff complains, was occasioned by the negligence or want of proper skill or care in the defendants, their servants or agents, on board the train, or connected with defendants' road, on which the plaintiff was a passenger; and the facts that the car
103 was thrown from the track, and the plaintiff injured, are prima facia evidence that there was carelessness, or negligence, or want of skill on the part of the servants or agents of the defendants, and throws upon the defendants the burden of proving that the accident was not occasioned by the servants and agents' fault."

Refused.

"5th. When it is proved that the car was thrown from the track, and the plaintiff injured, it is incumbent on the defendants to prove that the agents and servants in charge of the train were persons of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which they were engaged, and that they on this occasion with reasonable skill, and with the utmost prudence and caution; and if the disaster in question was occasioned by the least negligence, or want of skill, or prudence on their part, then the defendants are liable in this action."

"6th. If the jury find there was no want of proper skill or care or prudence on the part of the defendants and their employees, and that the accident to the plaintiff occured by his act in rashly and improperly arranging or jumping from the train, the defendants are not liable in this action; but if the want of proper care or skill of the defendants or their employees placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the train would upset or be thrown from the track, or that the defendants' em-
105 ployees were incapable of managing the train, the plaintiff is entitled to recover, although the jury may believe, from the position in which the train was placed by the negligence of the defendants' employees, the attempt of the plaintiff to escape may have increased the peril, or even caused the accident, and although they may also find that the plaintiff would probably have sustained little or no injury if he had remained in the caboose; and if the jury find from the evidence that the plaintiff, at the time he jumped or was thrown from the train, was in peril of life or limb by reason of the mismanagement of the train, then in such case no fault is to be imputed to the plaintiff by attempting to save his life, or to prevent harm to his body."

"7th. If the jury find from all the circumstances of the case the negligence of the defendants, and that the plaintiff did not con-
106 tribute thereto by any fault or negligence of his own, they may find full, compensatory, damages, and in making this assessment, they may take into consideration the loss of time, expenses incurred, agony endured, loss of use of arms, or any functions of the body or system, & depreciation of health, if such facts are proved, but punative or vindictive damages are not allowed."

Of which instructions the court refused to give the 4th. But each and every of the other instructions the court gave as prayed, and the defendants at the time excepted to the giving of the 5th & 6th instruc-
tion as they were severally given; and the defendant presents
107 this their bill of exceptions, and prayed that the same be signed & sealed and made a part of the record; which is done.

[SEAL.] MARK W. DELAHAY,
Associate Justice of the U. S. Circuit Court for the District of Kansas.

(Endorsed:) E. W. Kingsbury vs. Shoemaker et al. Charges of pl'f asked. Filed Nov. 27, 1869, A. S. Thomas, clerk. Filed Nov. 30, 1869, A. S. Thomas, clerk.

108 And on the said 30th day of November, A. D. 1869, the said defendants filed in the clerk's office of said court another bill of exceptions in said case, which is in words and figures as follows, to wit:

109 E. W. KINGSBURY, PL'FF,
vs.
ROBERT M. SHOEMAKER, MILLER,
whose first name is unknown, def't.

In the circuit court of the United States for the district of Kan

Be it remembered that, on the trial of this cause, at the prop
presented to and prayed the court to give in charge to t
the following instructions:

SHOEMAKER, MILLER & CO.,
at suit of
E. W. KINGSBURY.

In the circuit court of the United States for the district of Kansas.

The defendants request the court to instruct the jury in this case as follows, viz:

110 "1st. In actions of this character, the plaintiff, in order to entitle him to recover, is bound to prove that the injury of which he complains was not caused by any fault or want of ordinary care on his part."

"2d. The plaintiff must also prove that the injury was caused by the fault & negligence of the defendants; for if his injury could not have been avoided by the defendants with the exercise of the highest decree of care and dilligence in the operation of the train on which the plaintiff took passage, the defendants are not liable. The burthen of proof is on the plaintiff to prove alleged negligence of the defendant; the accident to the train, & injuries to him, does not prove it."

"3rd. The plaintiff, having taken passage on a construction train in a caboose, with a locomotive backing along the track, with its tender
111 in advance, and running in that manner hauling the train, the plaintiff cannot claim of the defendants compensation for his injury if that train thus run was operated with the highest degree of care and skill known to engineers in the operation of such train."

"4th. Carriers of passengers are not insurers of their safety, and are not liable if they are injured by their own fault or unavoidable accident, and passengers take all the risks of unavoidable accidents incident to the inferior or more dangerous mode of travel which they adopt."

"A. 5th. Carriers of passengers are not insurers of their safety
112 against unavoidable accidents, and if the jury believe, from the evidence in the case, that the injury to the pl'ff was caused by the sudden leaping of an animal upon the track immediately before the advancing train, whereby it was thrown from the track & the pl'ff injured, he cannot recover."

"5th. If the plaintiff leaped from the train while it was in motion, without reasonable and sufficient cause for doing so, from which he received his injury, he cannot recover."

"6th. If the locomotive, while backing down with the tender in advance, hauling the train, was arrested by an unseen animal suddenly leaping before it and throwing it from the track, by reason of which the plaintiff was injured, if there was no cause to suspect the
113 presence of the animal there, and the train was being run at its usual rate of speed, and the leaping of the animal was so sudden and immediate before the tender, that the engineer had no time to do anything to arrest the train, the accident must be regarded in law to have been unavoidable, and one of the risks taken by the plaintiff when he took passage on that train."

rig- 7th. When the facts are uncontroverted, the question of negligence is be d stion of law for the court. Now, the testimony is, without contra- Wi , that the animal suddenly leaped on the track immediately be- Supre e advancing tender, at a place where animals had not before one th been known to be, and where there was no reason to cause the [SE defendants or their servants to expect them to be; that it was so sudden, there was not time for the engineer to do anything to the progress of the train; that the tender and locomotive, running the animal, were instantly capsized; that the plaintiff leaped, or thrown, from the caboose, and was injured. Under such circumances it must, by the law, be held to have been an unavoidable accident to the plaintiff, and the verdict should be for the defendant."

Refused.

"8th. If the jury find from the evidence that the animal that caused the accident leaped suddenly upon the track immediately before the advancing tender at a place where animals had not before been
115 known to be, and where there was no reason to cause the defendants or their servant to expect them to be, and that it was so sudden that there was not time for the engineer to do anything to stop the train, and that he did all in his power to check the progress of the train, and that the tender and locomotive, running upon the animal, were instantly capsized, and by reason thereof the accident occurred, and the plaintiff was injured, the accident was unavoidable, and the pl'ff cannot recover."

J. P. USHER,
T. A. HURD,
For Def't.

Which instructions the court gave, as prayed, except the 7th, as in a special bill of exceptions is shown, and these, and the instructions given upon the prayer of the pl'ff, in a separate bill of exceptions, ap-
116 pearing elsewhere in this record, were all the instructions asked by the parties, or given by the court; and because the foregoing do not appear of record, the defendants present this their bill of exceptions, and pray that the same be signed and sealed, and made a part of the record; which is done.

[SEAL.] MARK W. DELAHAY,
Associate Justice of the U. S. Circuit Court for the District of Kansas.

(Endorsed:) No. 141. E. W. Kingbury vs. Shoemaker, Miller & Co. Def'ts' instructions. Filed Nov. 27, 1869, A. S. Thomas, clerk. Filed Nov. 30, 1869, A. S. Thomas, clerk.

And on this 30th day of Nov., A. D. 1869, came the said defendants by their attorneys, and filed in the said clerk's office their bond in this case, which is in words and figures following, to wit:

117 Know all men by these presents that we, J. P. Usher, are held and firmly bound unto E. W. Kingsbury in the full and just sum of twenty thousand dollars, to be paid to the said E. W. Kingsbury, his certain attorney, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this the 30th day of November, A. D. 1869.

Whereas lately, at a circuit court of the United States in and for the district of Kansas, in a suit depending in said court between E. Kingsbury, plaintiff, and Robert M. Shoemaker, & Miller, w[h]ose first name is unknown, defendants, judgment was rendered against said Robert M. Shoemaker and Edward Miller; and the said defe[n]dants having obtained a writ of error, and filed a copy thereof
118 clerk's office of the said court to reverse the judgment in aforesaid suit, and a citation directed to the said E. W. Kingsbury, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Robert M. Shoemaker and Edward Miller shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

J. P. USHER. [SEAL.]

Sealed and delivered in presence of and approved by—
MARK W. DELAHAY,
Associate Justice of the U. S. Circuit Court for the District of Kansas.

119 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States for the district of Kansas, do hereby certify the foregoing transcript to be a true, full, and perfect copy from the record of all the proceedings

had in said court in the case [in the case] of E. W. Kingsbury, plaintiff, against R. M. Shoemaker, Miller, whose first name is unknown, partners, doing business under the firm name of Shoemaker, Miller & Co., defendants, as the original remains in my custody.

In testimony whereof I have hereunto set my hand, affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 21st day of December, A. D. 1869.

[SEAL.] A. S. THOMAS, *Clerk.*

120 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Mark W. Delahay, associate justice of the circuit court of the United States for the district of Kansas, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, between E. W. Kingsbury, pl'ff, and Robert M. Shoemaker and Edward Miller, defendant, a manifest error hath happened, to the great damage of the said Robert M. Shoemaker and Edward Miller, as by their complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then,

121 under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed by—

MARK W. DELAHAY,
Associate Justice for the U. S. Circuit Court for the District of Kansas.

122 (Indorsed:) 141. Writ of error. Filed Nov. 30, 1869, A. S. Thomas, clerk.

123 United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein Robert M. Shoemaker & Edward Miller are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Mark W. Delahay, associate justice of
124 the circuit court of the United States for the district of Kansas, this thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty-nine.

MARK W. DELAHAY,
Associate Justice of U. S. Circuit Court for District of Kansas.

Due and sufficient service of the within citation is hereby admitted. Dated at Topeka this 30th day of November, A. D. 1869.

J. L. PENDERY,
BYRON SHERREY, &
A. M. CASE,
Att'ys Plaintiff.

125 (Indorsed:) No. 141. Robert M. Shoemaker & Edward Miller, plaintiffs in error, vs. E. W. Kingsbury, def't in error. Citation. Filed Nov. 30, 1869, A. S. Thomas, clerk. Clerk's fees for record, $26 35.

(Indorsement on cover:) No. 414. Robert M. Shoemaker & Edward Miller, plaintiffs in error, vs. E. W. Kingsbury. Kansas C. C. U. S. Filed 3d January, 1870.

Supreme Court of the United States.

DECEMBER TERM, 1870.

ROBT. M. SHOEMAKER & EDWARD MILLER

vs.

E. W. KINGSBURY.

BRIEF OF PLAINTIFFS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

J. P. Usher,
Attorney for Plaintiffs in Error.

Judd & Detweiler, Prs.

Supreme Court of the United States.

DECEMBER TERM, 1870.

ROBERT M. SHOEMAKER AND EDWARD MILLER

vs.

E. W. KINGSBURY.

Brief of Plaintiff in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

This was an action for breach of contract of carriage of Kingsbury, as a passenger, by defendants in error.

The suit was brought in the State court and certified into the circuit court of the United States.

The petition and process in the State court was against Robert M. Shoemaker and ——— Miller, whose first name was alleged to be unknown; and so the case continued, under all its phases, until verdict, upon which judgment was entered against Robert M. Shoemaker and Edward Miller. This was done without any order of the court, or suggestion that it had become known that the given name of Miller was Edward.

The rules of the circuit court, a copy of which is placed upon the files of this court, adopt the Civil Procedure Code of Kansas of 1859 as the rule of practice in that court; and section 151 of the Code provides for proceeding against defendants whose names are unknown; "where the true name is known, the pleading must be amended accordingly."

The pleadings were not amended so as to show the given

name of defendant, Miller, and, for all that appears, his name may have been any other than *Edward Miller*, against whom the judgment was entered, and who brings this writ of error.

It is true that in the proceedings for certifying the cause, the petition and affidavit state that his name is Edward Miller, but the plaintiff did not regard that as evidence of his name; for, in two petitions afterwards filed, he avers that his first name is unknown. He is therefore estopped from going back to the petition and affidavit, and affirming an estoppel based upon those proceedings as to the name of Miller.

Moreover, as Miller was not served with process, and no warrant of attorney from him to enter his appearance, he is not bound by the statement of others, acting without authority. Messrs. Hurd & Stillings, attorneys, say in the petition to remove the cause, that the Miller they represent is a citizen of the State of Missouri, and Shoemaker a citizen of Kansas; while the affidavit of C. S. Greely says that he knows the defendant—that Shoemaker is a citizen of Ohio, and Miller of Pennsylvania; and the State court finds upon the proofs that all of the "*defendants are residents of other States.*" (See p. 6, transcript.)

It was error, in such state of the case, to enter judgment against *Edward Miller*.

The declaration to the last, averred his name was unknown. The verdict was not against him, nor did the court order such judgment; he was not served with process, nor did the Miller of the firm of Shoemaker, Miller & Co., ever petition to have the cause certified into the circuit court; it was another Miller, in Missouri.

The 15th rule of the circuit court of the United States for Kansas adopted May 25, 1864, is as follows:

No. 15. Rule—"Where a suit or action is commenced in any of the State courts, and certified or removed thence into this court, the plaintiff shall file a new declaration or petition in said suit within twenty days after the adjournment of the term of court to which said suit or action was removed," &c.

The plaintiff on the 27th of May, 1868, did file a new declaration upon which a trial was had, without a verdict, and afterwards on the 26th of May, 1869, by leave of the court filed another declaration. In both of these declarations, and in the answers thereto, it is averred that the given named of Miller is unknown, and in neither of them is the citizenship of the parties averred; and the question is, had the circuit court jurisdiction of the cause.

The court was without jurisdiction, unless the plaintiff was a citizen of the State of Kansas, and the defendant citizens of other States, and this necessary fact must be averred in the pleadings.

Strawbridge *vs.* Curtis, 3 Cranch, 267.
The Lafayette Ins. Co. *vs.* French, 18 How., 404; 20 How., 227.

Coal company vs Slatchford
11 Wallace 172. Id 210

The averment of citizenship may be made in any part of the pleadings.

Lafayette Ins. Co., 18 How., 404; supra.

Nevertheless it must appear by averment in the pleadings; statements in the evidence, or in collateral affidavits and petitions, will not do.

Averment of domicil without averment of citizenship will not answer. Turner *vs.* Bank North America, (4 Dall., 8;) so that the finding of the State court that defendants were not residents of Kansas, goes for nothing. +

The filing of the declaration on the 26th of May, 1869, was a waiver of all former declarations, and copies of them should not have been certified in the transcript. They are not properly parts of the record.

There is no averment of citizenship in the declaration or in the answer.

+ Corp vs Veerwiya 7 Johnson 145
Residence & Citizenship not the same
Baker vs White & Sherman
18 Howard 187
Jackson vs Twentyman 2 Peters 136
Brown Bolton vs Murray 4 Cranch 46
Morgan vs Gilleaudeau

But if it be urged that the defendants are estopped to object to this jurisdiction of the court because defendant obtained the order to certify the cause, it is answered, there can be no estoppel to aver the want of jurisdiction, (Capron *vs.* Van Norden, 2 Cranch, 126.) Moreover the petition for the certification of the cause alleges that Shoemaker was a citizen of the State of Kansas, and Miller of the State of Missouri, and the affidavit of C. S. Greeley states that Miller was a citizen of the State of Pennsylvania, and as the statute of Kansas is explicit (sec. 151, *supra*) that a *copy of a summons must be personally served on a defendant whose name is unknown*, it is quite impossible to say what Miller was intended to be sued by the plaintiff; he is not indentified as being a citizen of any State, nor did the State court find that he was, but the order certifying the cause says, that *the defendants are residents of other States*; now residence has nothing to do with the question, citizenship is the matter involved. (4 Dall., 8.)

It cannot be maintained that the suit was properly certified, as in the case of Bushnell *vs.* Kennedy, 9 Wall., 387.

If the defendant in error shall maintain that the proceeding to cause the suit to be certified into the circuit court of the United States was in pursuance of the act of Congress of July 27, 1866, (admitting as he must that Shoemaker was a citizen of Kansas,) and that he only sought to proceed against Miller, he is answered by the fact that Miller was never served with process; that the Miller who, by Messrs. Hurd & Stillings, sought a change to the circuit court, was of Missouri, while the affidavit of Mr. Greeley shows that the Miller who was of the firm of Shoemaker, Miller & Co., was a resident and citizen of Pennsylvania, and that the Pennsylvania Miller has not been served with process, has not appeared and answered, nor filed any petition for the removal of the cause; so far as the record shows, he has had no notice of it; he has not been served with process; has not appointed any attorney; made any petition for the removal of the cause, or executed any bond for the removal.

18 Wallace 210

Hurd & Stillings say in the petition that the party for whom they appeal is Edward Miller, of Missouri, but that is not the man the plaintiff was suing, for he avers over and again thereafter that Miller's first name is unknown, and Hurd & Stillings in their answers say his name is unknown.

But passing this, the petition was for both Shoemaker and Miller. And Shoemaker being by the petition a citizen of Kansas, he could not by law have the cause certified into the circuit court, yet it was done both as to him and Miller, and petitions were filed one after the other against them, which they answered, and the cause was tried, verdict against Shoemaker, Miller & Co., and judgment rendered against Robt. M. Shoemaker and Edward Miller. This was all error for want of jurisdiction; failing as to one upon a joint contract it failed as to both, though it might not as to Miller if the plaintiff had proceeded against him solely, always provided the court was not, for the reasons before mentioned, without jurisdiction as to him. Furthermore, the action was upon contract and all the parties had to be joined in the suit.

It is believed that for the errors already noticed the judgment must be reversed, and that it may not be necessary to consider the errors now to be noticed.

The court gave for the plaintiff the following instruction to the jury, (page 31 :)

"When it is proved that the car was thrown from the track and the plaintiff was injured, it is incumbent on the defendants to prove that the agents and servants in charge of the train were persons of competent skill, *of good habits*, and in every respect qualified and suitably prepared for the business in which they were engaged, and that they acted on this occasion with reasonable skill, and with the utmost prudence and caution, and if the disaster in question was occasioned by the least negligence or want of skill or prudence on their part, then the defendants are liable in this action."

Now, this instruction must be held to have been given with reference to the facts in the case: 1st, that the accident was

+ Hurd vs Audenreid 1 Paine 410
Beardsley vs Torrey 4 Washington 286
Wilson vs Blodgett 4 McLean 363
Hubbard vs Worcester R.R.Co 3 Blatchford 84

caused by the sudden leaping of an ox, from a place of concealment before the advancing train, which striking, and running upon the ox threw the train in part off the track; 2, that the caboose in which Kingsbury was riding was not overturned or thrown from the track, but that his injuries were caused by his voluntary leaping from the caboose, in which, if he had remained he would not have been injured; 3d, that the accident was in an uninhabited part of the country, upon the plains, where the defendants or their servants had not the slightest reason to expect any obstruction, and the leaping of the animal upon the track before the advancing train was as complete a surprise as if a rock had fallen from the skies upon the track, before the train. And that after the ox was discovered, it was impossible to avoid coming upon him.

The error in this instruction is that it assumes that proof of this particular accident to the construction train, on which the plaintiff was being carried, cast the burden of proof upon the defendants to establish that it was without their fault. This was error. The plaintiff averred and was bound to prove that he was injured by the negligence of the defendants, and without any fault or negligence of his own.

This is the unvarying rule of law.

Deyo *vs.* N. Y. Central R. R. Co., 34 N. Y., 9, and cases cited.

Holbrook and Wife *vs.* U. & S. R. R. Co., 2 Kern, 236.

X Curtis vs Rochester & Syracuse R R Co
+ 18 N Y R 534

And more especially in a case of this character, where his injury was occasioned by his own act, in leaping from the car, he was bound to prove that his act was proper under the circumstances. It was error to give an instruction which made such proof unnecessary.

It often happens, perhaps in most cases, that the plaintiff, in proving the accident, proves such a state of case as to cast the

+ Transportation Co vs Downey
11 Wallace 129

burden of proof of due care upon the carrier, as, for instance, a defective car, broken rail, sunken track, or collision.

But in Deyo's case, supra, a malicious person had placed a rock on the track, and it was held that the plaintiff could not recover without proof of negligence in the plaintiff, in failing to discover or prevent this obstruction.

So in this case these contractors, constructing this railroad upon the uninhabited, dreary plains, allowing persons to ride upon their construction trains, are not, *per se*, chargeable with negligence for failing to anticipate and provide against the presence of cattle that might possibly be found in the vicinity of the railroad track. If there was negligence in that particular, it had to be proved by the plaintiff, and the court could not, without error, affirm that when the car was off the track the burden of proof was cast upon the defendants; more especially, when the injury was caused by plaintiff's leaping from the car, when, if he had remained, he would not have been injured.

If cattle had not been accustomed to roam or be in the vicinity of the place of the accident, it was not negligence in failing to anticipate their presence.

2d. It was error to instruct that, the cars being thrown from the track, the defendants were bound to prove the *skill, good habits, qualifications*, &c., of the employés in charge of the train. †

The instruction assumes that the car could not have been thrown from the track if the employés had been competent, and that the accident was an evidence of their incompetency.

Against this assumption we oppose the principle of law that all persons are presumed to perform their duties, and in the employment of railroad operatives, it is conclusively presumed that due care has been taken, until the contrary is proved.

The presumption is that the accident was unavoidable, until the contrary was proved.

Now, as a test of the legality of this instruction, if the car was thrown from the track by an unavoidable accident, would

† Hadechal vs The State
2 Indiana 55

the defendants be liable, though their operatives were unskilled and of vicious habits?

Or, if they had possessed the highest degree of skill, and been of unexceptionable habits, how would these virtues have profited the defendants, if the accident was caused by their negligence?

It was not the duty of the defendants to inquire after the habits of their employés; nor could their habits be put in issue in the cause, and it was error to do so. The court had no right to require evidence of the defendants on this subject. The instruction ought to have been, did the defendants, taking into account the mode of transportation, as far as human care and foresight could go, provide for the safety of the plaintiff? And did their employés in charge of the train exercise the highest degree of skill and judgment on the occasion of the accident? Was the accident solely their fault, or was it unavoidable? The affirmative of all these issues was upon the plaintiff.

Defendants cars ran into a large opening caused by the sliding away of a part of their tract in a storm, whereby the plaintiff, a passenger, was injured. Held, that the proper instruc-struction to give to the jury was that, "although the mere fact that a person is injured while being transported on a railroad car does not impose on the railroad company the burdens of disproving negligence, yet the presumption of the want of care may arise from circumstances attending the injury, and whenever such a state of things exist, the onus is upon the company to show that the injury did not result from any negligence on its part."

Brehm *vs.* Great Western R. R. Co., 34 Barb., 256.

The rule of law laid down in the instruction complained of is much more servere. It disposes of all consideration of the manner or cause of the injury as a part of the plaintiff's case, and declares the defendants in fault, from the fact of the accident.

Though these defendants were not common carriers of passengers, yet the same rule is applied to them in this instruction

to such carriers, and something more, for this instruction says that if the disaster "was occasioned by the least negligence or want of skill or prudence on their part, the defendants are liable in this action."

By this, no matter how negligent the plaintiff was on that occasion or how much his conduct contributed to the injury to himself, the defendants are liable.

In this instruction the foundations for the recovery are laid and I have endeavored to show that, from first to last, it is erroneous—the jury being certain to be misled by it.

Exception is taken to the sixth instruction of plaintiff (found on page 33 of printed record.)

The first sentence of that instruction assumes that the defendants would be liable if there was a want of skill, care, or caution on the part of themselves or employés, though the injury to the plaintiff may have occurred by his fault and rashness in jumping from the train. The idea of contributory negligence is discarded as an element of defence in the case. The instruction then goes on, and the jury are directed that if the want of proper care, &c., of defendants, "*placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the train would be upset or be thrown from the track, or that the defendants' employés were incapable of managing the train the plaintiff is entitled to recover.*" And so by this sentence of the instruction the defendants are liable to the plaintiff if the *passengers* on the train (there being many, as Kingsbury testified) were in peril, and they had reasonable ground to believe the train would be thrown from the track, no matter whether the plaintiff believed it was necessary for him to leap from the train or not to avoid injury, or whether the peril was unavoidable. The liability turned upon the apprehension of the *passengers*, and not of the plaintiff, whether the defendants were negligent or not, and this, as the court next proceeds to say "*although the jury may believe from the position in which the train was placed by the negligence of the defendants' employés, th attempt of the plaintiff to escape may have increased the peril,*

even caused the accident." By this sentence the very pointed issue, viz: *Negligence* of the defendants occasioning the accident, is taken from the jury, and the court affirms that the position in which the train was placed *was caused by the negligence of the defendants' employés;* negligence of the defendants is taken for granted and asserted as an uncontroverted fact. All of this sixth instruction was erroneous. It usurped the province of the jury in declaring that there was negligence, it justified whatever rashness the plaintiff may have practiced, because of the apprehensions of others, and not his own, and excluded the idea of the necessity of his proving there was negligence on the part of the defendants, and no want of care on his part. The last sentence of the instruction does not redeem it from the error, it simply asserts that upon certain conditions no fault is to be imputed to the plaintiff because of his jumping from the train, but the jury had already been told that if the passengers had reason to apprehend that the train would be upset or thrown from the track by reason of the position in which the train was placed by the negligence of the defendants' employés, the plaintiff was entitled to recover. After being instructed that the plaintiff was entitled to recover upon condition of the apprehensions of the passengers, and the direct affirmation of negligence of the defendants, the jury would have but little difficulty in finding a verdict for the plaintiff.

The defendants did not expect the court to instruct the jury that the plaintiff could recover for injuries he inflicted on himself by leaping from the caboose because of the fears of the passengers; or that the court would in so many words declare that the train was in an improper condition "*by the negligence of the defendants' employés.*"

It may be urged that in the instructions given at the instance of the defendants, the law was correctly stated in the matters above complained of. To some extent, that is so; but these instructions were not given as qualifications of the instructions given at the request of the plaintiff, or in explanation of them. There is no attempt at explanation. In one breath the court instructs

Chichester v Whitebath 51 Ills 259.
Bank " Gottslick 14 Peters 19.
Smith " Condary 1 How. 28.
C.B. & Q. RR Co " Paine 119. Ills. 499.
Rockford Rock Island & Co " Henry 50 Ills. 264.
Springfield & Co " Smith et al 24 Ills 480.
Cropper " Pitman 13 Maryland 19
15 Maryland 29.

jury, at the instance of the plaintiff, that when it is proved that the car is thrown from the track, the burden of proof is upon the defendants to establish it was without their fault; and in the next, for the defendants, the jury are instructed that the accident to the train and the injury of the plaintiff do not prove the negligence of the defendants.

What was the jury to think of these cross instructions? The law is that when the instructions a ment must be reversed.

Ferguson vs. Fo
For " M&
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But the sixth instruction given at the instance of the plaintiff, is nowhere qualified or explained; in that the jury were squarely instructed that if the passengers were put in a state of peril and had reasonable ground for supposing that the train would upset, or that the defendants' employés were incapable of managing the train, *the plaintiff is entitled to recover.* Now, if these conditions were all true, as the jury may have found they were, and it cannot be known that the verdict is not solely based upon this part of the instruction, was the plaintiff entitled to recover?

The defendants requested the court to instruct the jury as follows:

"When the facts are uncontroverted, the question of negligence is a question of law for the court. Now the testimony is without contradiction, that the animal suddenly leaped on the track, immediately before the advancing tender, at a place where animals had not before been known to be, and where there was no reason to cause the defendants or their servants to expect them to be; that it was so sudden, there was not time for the engineer to do anything to stop the progress of the train; that

even caused the accident." By this sentence the very pointed issue, viz: *Negligence* of the defendants occasioning the accident, is taken from the jury, and the court affirms that the position in which the train was placed *was caused by the negligence of the defendants' employés;* negligence of the defendants is taken for granted and asserted as an uncontroverted fact. All of this sixth instruction was erroneous. It usurped the province of the jury in declaring that there was negligence, it justified whatever rashness the plaintiff may have practiced, because of the apprehensions of others, and not his own, and excluded the idea of the necessity of his proving there was negligence on the part of the defendants, and no want of care on his part. The last sentence of the instruction does not redeem it from the error, it simply asserts that upon certain conditions no fault is to be imputed to the plaintiff because of his jumping from the train, but the jury had already been told that if the passengers had reason to apprehend that the train would be upset or thrown from the track by reason of the position in which the train was placed by the negligence of the defendants' employés, the plaintiff was entitled to recover. After being instructed that the plaintiff was entitled to recover upon condition of the apprehensions of the passengers, and the direct affirmation of negligence of the defendants, the jury would have but little difficulty in finding a verdict for the plaintiff.

The defendants did not expect the court to instruct the jury that the plaintiff could recover for injuries he inflicted on himself by leaping from the caboose because of the fears of the passengers; or that the court would in so many words declare that the train was in an improper condition "*by the negligence of the defendants' employés.*"

It may be urged that in the instructions given at the instance of the defendants, the law was correctly stated in the matters above complained of. To some extent, that is so; but these instructions were not given as qualifications of the instructions given at the request of the plaintiff, or in explanation of them. There is no attempt at explanation. In one breath the court instructs

Chicester v Whitebath 51. Ills 259.
Bank " Gottslick 14. Peters 19.
Smith " Conary 1. How. 28.
C.B. & Q. RR Co " Paine 49. Ills. 499.
Keokuk Packet Co " Henry 50. Ills. 264.
Springbakere " Smith et al 24. Ills 480.
Cropper " Pitman 13. Maryland 19
15 Maryland 29.

jury, at the instance of the plaintiff, that when it is proved at the car is thrown from the track, the burden of proof is upon the defendants to establish it was without their fault; and in the next, for the defendants, the jury are instructed that the accident to the train and the injury of the plaintiff do not prove the negligence of the defendants.

What was the jury to think of these cross instructions? The law is that when the instructions are both ways, the judgment must be reversed.

Ferguson For Hilliard on new trials 214. 215. vs. Fox. 1. Metcalf (Ky.) 83. " McElroy. 11 Cal. 154.

But the sixth instruction given at the instance of the plaintiff, is nowhere qualified or explained; in that the jury were squarely instructed that if the passengers were put in a state of peril and had reasonable ground for supposing that the train would upset, or that the defendants' employés were incapable of managing the train, *the plaintiff is entitled to recover.* Now, if these conditions were all true, as the jury may have found they were, and it cannot be known that the verdict is not solely based upon this part of the instruction, was the plaintiff entitled to recover?

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the tender and locomotive, running upon the animal, we instantly capsized; that the plaintiff leaped or was thrown from the caboose, and was injured. Under such circumstances, it must by the law be held to have been an unavoidable accident to the plaintiff, and the verdict should be for the defendants.

This instruction the court refused to give, and the defendants duly excepted. But the court, in a bill of exceptions, page 32, has affirmed that the "*instruction ought to have been given, if the same was correct in point of law.*"

The object and intention of this affirmation in the bill of exceptions was to make known to this court that, so far as the facts of the case were concerned, they were accurately stated in the instruction which the court refused to give, and that the refusal was upon the sole ground that the facts thus stated, though strictly true, were not in law a defence to the action. In this it is maintained that the court erred—

1. Upon reason and authority it is clear that upon a given state of facts, from which negligence in any transaction or performance of duty is inferred or asserted, it is a question of law for the court to say whether, from those facts, negligence can be inferred or imputed.

The language of the court is, "The question of negligence, the facts being uncontroverted, is a question of law for the court."

Gonzales *vs.* N. Y. & H. R. R. Co., 38th N. Y., 440.

The first sentence of the instruction is in the words of the law, and it is only to be considered whether the facts stated in the body of the instruction, being true, as declared by the judge, show the accident to have been unavoidable or not. Now, accidents are in law held to be unavoidable when they occur under such circumstances that the highest degree of care and human foresight could not have guarded against them. It is not what subsequent events may show might have been done to avoid the accident, but we are to judge the case as it appeared and was before and at the time of the accident.

Cropper " Pitman 15 Maryland 17
15 Maryland 29.

I am aware that there are many cases in the books which hold it to be the duty of railroad companies to see that neither cattle nor any other obstruction is upon the track, and the fact of such obstruction and collision of the train therewith is *prima facie* negligence.

But these will all be found to be cases of accident where the cattle had been accustomed to be, and where there was good reason to expect them to be; many of them (the cattle) were in sight long enough to have stopped the train before the collision; and they have all proceeded on the ground that the companies had actual warning of the particular danger, and neglected to provide against it.

So far as the principle of the law is concerned, no matter what the obstruction may be, whether animate or inanimate, it is the same.

In the case of Sawyer *vs.* The Hannibal, &c., R. R. Co., (27 Mo., 240,) the bridge over the Platte had been burned by the rebels, and the train, with all on board, was precipitated into the chasm. It was held that if the officers in charge of the train had no means of knowing the bridge had been burned, and used as much care and diligence as a very prudent and careful man would have exercised where his own interest and safety were concerned, the railroad company was not liable.

In the case of Willis *vs.* Long Island R. R. Co., (34th N. Y., 670,) the engineer saw the obstruction on the track, (probably dropped by a preceding train;) he ran upon it, and was held guilty of negligence.

In the following cases, in which the railroad companies were held liable for the injury to passengers caused by running the train upon cattle, it appeared in every instance that the cattle were in view at the time, and that the accident might have been avoided with due care; and stress is laid upon the fact that the cattle had been accustomed to roam and be at the places of the accidents.

Sullivan *vs.* Phil. & Reading R. R. Co., 30th Penn. R., 234.

N. & C. R. R. Co. *vs.* Messino, 1st Sneed, 220.

Where an extraordinary fall of rain had washed away a p[illegible]ed tion of defendant's track, causing an accident, and injury to t[illegible] plaintiff, held, that defendant was not bound to know th[illegible] consequences that might ensue from the flood, but only that which could be known by the exercise of ordinary skill and prudence.

Withers *vs.* North Kent R. R. Co., 3 Hurlst. & N., (Am. Ed.) 969.

If there were no reason from past experience to anticipate danger of cattle upon the road, the defendants cannot be held culpable, because of their unexpected appearance.

Curtis v. R. R. & C. 18 N. Y. 534

Dangers attend us everywhere; no one can say he is absolutely safe at any time. In this case, the appearance of cattle upon the track could not be expected or hardly imagined, for it was on the borders of the range of the buffalo, which never await the approach of the train. But from the testimony, it appears that a wagoner on the plains had encamped on the opposite side of the Smoky Hill river, and one of his oxen strayed over the river into the high weeds and grass along side of the track, which concealed him from view until the train was near to him, when he leaped upon the track, so near to it that the engineer had barely time to reverse the engine before the train was upon him.

Since the accident we can see how it might have been avoided, which is the case with respect to all accidents. The high grass and weeds along the track could have been scoured with men and dogs in advance of the train, and the animal driven away,

Cropper v. Tilman 15 Maryland 29.

the train run so slow that it could have been instantly opped. The highest degree of care does not require such extraordinary precaution. Justice McLean, in a passenger case, in illustration of what might be held to be unavoidable accidents excusing the carrier, instances the firing of a gun by which the horses should be frightened and run away. How are we to distinguish such illustrations in principle from this? If guns were being continually fired along the line of stage road, of course the carrier would have to provide against accidents because of them, so in this case if cattle had been accustomed to be in the vicinity of the place of the accident, the carrier must have provided against accidents because of them.

In reason it cannot be maintained that the defendants or their servants had any more cause to apprehend that roaming cattle would be on their track, than they had that malicious persons would place obstructions upon it; and not half as much as that the train would be attacked by the Indians. In fact the court in declaring in the bill of exceptions, that the instruction ought to have been given if correct in point of law, says: that "*there was no reason to cause the defendants or their servants to expect the cattle to be there,*" and that the court was not mistaken, this court will be abundantly satisfied upon reading the testimony of the engineer and fireman, William and Willis Converse. They are the only witnesses to the cause and manner of the accident to the train.

The facts being as stated in the instruction, was it not in law an unavoidable accident, and ought not the instruction to have been given?

It will be observed on page 19, folio 53, that the defendants after the motion for a new trial had been overruled and excepted to, *moved the court to arrest the judgment, which was overruled and excepted to.*

The motion ought to have been granted for the following reasons:

1. The court did not have jurisdiction of the defendants for the reasons hereinbefore stated.

Gridley v Short. Law of R R Cor 401 -

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11. Mar. 129. —

Supreme Court of the United States.

No. 188.

ROBERT M. SHOEMAKER AND EDWARD MILLER

vs.

E. W. KINGSBURY.

REPLY.

The counsel for the defendant in error insists that there was no error in the refusal of the court below to give defendant's 7th instruction to the jury, because he says:

1. It *assumes* that the facts are uncontroverted, and therefore that negligence is a question of law, and

2. Because he says it assumes that the evidence is without contradiction, as detailed in the instructions, &c.

It is also denied for defendant in error, by his counsel, that the evidence was, as is supposed in the instruction, in this, that cattle had been seen in that vicinity, and it is asserted that the instruction embraced only a partial statement of the facts in the case, from which negligence was to be inferred, and instances the following: (1) want of a *turn table*; (2) want of lights, and (3) neglect of the defendants to cut down the high weeds along the track from which the animals came upon the track.

To understand the precise position of the judge who tried the cause upon this part of the case we are to consider that he gave the 6th and 8th instructions of defendant as follows:

"6th. If the locomotive, while backing down with the tender in advance, hauling the train, was arrested by an unseen animal

suddenly leaping before it and throwing it from the track, by reason of which the plaintiff was injured, if there was no cause to suspect the presence of the animal there, and the train was being run at its usual rate of speed, and the leaping of the animal was so sudden and immediate before the tender that the engineer, had no time to do anything to arrest the train, the accident must be regarded in law to have been unavoidable, and one of the risks taken by plaintiff when he took passage on that train."

"8th. If the jury find from the evidence that the animal that caused the accident leaped suddenly upon the track immediately before the advancing tender at a place where animals had not before been known to be, and where there was no reason to cause the defendants or their servant to expect them to be, and that it was so sudden that there was not time for the engineer to do anything to stop the train, and that he did all in his power to check the progress of the train, and that the tender and locomotive, running upon the animal, were instantly capsized, and by reason thereof the accident occurred, and the plaintiff was injured, the accident was unavoidable, and the plaintiff cannot recover."

And refused the 7th, as follows:

"7th. When the facts are uncontroverted, the question o negligence is a question of law for the court. Now, the testimony is, without contradiction, that the animal suddenly leaped on the track immediately before the advancing tender, at a place where animals had not before been known to be, and where their was no reason to cause the defendants or their servants to expect them to be; that it was so sudden there was not time for the engineer to do anything to stop the progress of the train; that the tender and locomotive, running upon the animal, were instantly capsized; that the plaintiff leaped, or was thrown, from the caboose and was injured. Under such circumstances it must, by the law, be held to have been an unavoidable accident to the plaintiff, and the verdict should be for the defendant."

The giving of the 6th and 8th instructions is proof conclusively that in the opinion of the court the causes of negligence, now for the first time suggested by counsel, were not elements in the cause; and, in fact, they were not, as will soon be de-

monstrated, but the difficulty with the judge was that he thought he was not authorized by the practice of the court to dictate the verdict of the jury; it being strenuously maintained in Kansas by many lawyers and some judges that the court does not possess such power, and that the court is bound to submit the cause to the jury whether there is or is not any evidence, and so the judge thought and ruled in this case.

And the court, by the statement in the bill of exceptions, that the 7th instruction ought to have been given, if correct in point of law, is to be understood as saying that in point of law he was not authorized to direct a verdict for the defendant for any reasons.

This was the precise state of the case at the trial; the court did not doubt that the facts supposed in the 6th and 8th instructions, and declared to be true beyond contradiction in the 7th, were a complete defence, but doubted his right to so decide.

We have only to refer to the declaration, (page 15,) to show that the *turn-table, weeds, and light*, had nothing to do with the case. The plaintiff avers, that he was "*received by the said defendants in the cars and on the railroad aforesaid* AS RUN AND USED BY THE SAID DEFENDANTS," &c.

There was no *turn table*, and there is no allegation or pretence in the declarations or proofs that the train was not run on the day of the accident, as it ever before had been—time, speed, and manner all the same; and the law is that the defendants were only liable for due care of the train, such as it was, and operated as it was.

Hazzard's Case, 26 Ill. R., page 380-1

The breach of duty alleged is that the car was run off the track by the carelessness and negligence of the defendants' servants, (page 15 printed record;) there is no allegation of negligence in respect to the track or cars, or failure to cut weeds or any thing of the kind. All this about turn-table, lights and weeds is an after thought; it was not the business of the contractors to cut weeds along the road they should build, nor

had they any right to do it, but whether or not, there is no allegation in the declaration of negligence in that particular, and proof was not, and could not be, offered of such supposed negligence, 1st McLæan's R., McKinneys case, p. 551, the negligence alleged is that of the servants in operating the train; that was the only issue, and it was in respect to that that the rulings of the court were made.

The court in the midst of the doubt respecting his right to instruct the jury to find for the defendant, was, by plaintiffs, pressed with instructions which were in substance a copy of the instructions in the case of Saltonstall *vs.* Stokes, which he quaintly said he could not go back upon, and with them came "confusion worse confounded," for by these instructions the jury understood that the judge believed the defendants were culpable when it is clear that he did not, as has already been shown.

These instructions are inconsistent, irreconcilable, and repugnant to those given for the defendant, which was error.

Hilliard on New Trials, 214–15.
Ferguson *vs.* Fox, 1 Metc., (Ky.,) 83.
Fox *sv.* McIlory, 11 Cal., 154.
Lobdell *vs.* Hall, 3 Nev., 508.
C. B. & I. R. Co. *vs.* Paine, 49 Ill., 499.
Keokuk Packet Co. *vs.* Henry, 50 Ill., 264.
Springdale Com. Ass. *vs.* Smith *et al.*, 24 Ill., 480.
13 Md. Rep., 191.
15 Md. Rep., 29.

The instructions number 5 and 6 excepted to, are as follows:

"5th. When it is proved that the car was thrown from the track, and the plaintiff injured, it is incumbent on the defendants to prove that the agents and servants in charge of the train were persons of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which they were engaged, and that they acted on this occasion with reasonable skill, and with the utmost prudence and caution; and if the disaster in question was occasioned by the least negligence, or want of skill, or prudence on their part, then the defendants are liable in this action.

"6th. If the jury find there was no want of proper skill or care or caution on the part of the defendants and their employés, and that the accident to the plaintiff occurred by his act in rashly and improperly springing or jumping from the train, the defendants are not liable in this action; but, if the want of proper care or skill of the defendants or their employés placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the train would upset or be thrown from the track, or that the defendants' employés were incapable of managing the train, the plaintiff is entitled to recover, although the jury may believe, from the position in which the train was placed by the negligence of the defendants' employés, the attempt of the plaintiff to escape may have increased the peril, or even caused the accident, and although they may also find that the plaintiff would probably have sustained little or no injury if he had remained in the caboose; and if the jury find from the evidence that the plaintiff, at the time he jumped, or was thrown from the train, was in peril of life or limb by reason of the mismanagement of the train, then in such case no fault is to be imputed to the plaintiff by attempting to save his live, or to prevent harm to his body."

These instructions were inapplicable to the case on trial, and misled the jury, inasmuch as they directed a verdict for the plaintiff, if certain facts were found, because they wholly ignored the contributory negligence of the plaintiff.

49 Ill., 490.
50 Ill., 264. *Supra.*

The sixth affirms that the accident to the train was caused by the negligence of defendant's employés, the very fact the jury was to find. This was error.

Chichester *vs.* Whiteleather, 51 Ill., 259.
14 Peters, 31.
1 Howard, 28.

It affirms that, if the passengers were, by the want of proper skill and care of the defendants or employés, placed in a state of peril, and they had at that time a reasonable ground to believe that the train would upset or be thrown from the track, or that the employés were incapable of managing the train, the

plaintiff was entitled to recover, and this whether the plaintiff believed he was in danger or not, or whether he used reasonable care and discretion in leaping from the train, his right to recover was based upon what the jury believed the apprehensions of the passengers were.

Was not this an error?

The instruction affirms that, if he was in peril of life or limb by reason of mismanagement of the train, no fault is to be imputed to him for jumping from the train. This was error, because it puts the judgment of the jury, formed at the trial, as to the imminence of peril, and the propriety of acting in the emergency, in place of the reasonable opinion of the plaintiff at the time; and this last clause of the sixth instruction is inconsistent with the previous clauses thereof.

There was also error in this clause of the instruction in this, that the court failed to add thereto the qualification required in such cases, viz: provided the plaintiff was not rash nor imprudent in jumping from the cars. There was further error in said clause in this, that the court thereby assumed to declare that there was no negligence on the part of the plaintiff, whereas the law leaves the circumstances to the jury to find if the party acted rashly and under an undue apprehension of the danger.

(See Keokuk Packet case, 50 Ill., before cited, and Yarwood's case, 17 Ill., p. 521.)

These instructions throughout assume the negligence of the defendant. The very matter which was most strenuously controverted, and asserted what was not proved in the opinion of the court, for the judge, in the bill of exceptions, page 32, says: "The seventh instruction of the defendant ought to have been given, if the same was correct in point of law."

This is an affirmance by the judge that that ins.ruction stated the facts in the case. If that was so, and it is conclusive here, the train was not placed in any dangerous position by the defendant's employés, and the court ought not to have so charged the jury.

By the sixth and eighth instructions given for the defendant,

(page 35,) the jury were instructed that if the injury to the plaintiff was caused by the sudden leaping of an animal upon the track, immediately before the advancing train, whereby it was thrown from the track and the plaintiff injured, he could not recover. He declares the facts to be as supposed in these instructions in the bill of exceptions to the refusal to give the seventh instruction of the defendants, while in the sixth instruction for plaintiff he squarely asserts that the train was placed in its position of peril by the defendant's employés; in effect that it ran upon the animal by their negligence, and that it was not unavoidable, as else where he certifies it to have been, and that it was not by the sudden leaping of the animal upon the track, and that there was no time for the engineer to do anything to stop the progress of the train.

In Saltonstall's case, the injury was occasioned by the reckless misconduct of the driver. The road was smooth, but the driver was drunk and brutal; and well might the court have given the instructions in that case, and might in stronger terms have affirmed the negligence.

But the facts in this case are all different, not only in the mode of carriage, but in the conduct of the servants. They were in their proper places, exercising the highest degree of care, and the verdict would have been for the defendants if the court had supposed it lawful to direct such verdict where there was a total failure of proof, or if the jury had not been misled and confounded by contradictory instructions.

It is said that the seventh instruction refused does not truly and fairly state all the facts in issue in the case; but the court, in the bill of exceptions, has affirmed substantially that it does, which cannot be here gainsaid, and if the declaration and evidence are referred to, it will be found that the judge was correct—for months the servants of defendant's had passed over the road without seeing any cattle upon or near it, and the plaintiff's witnesses do not prove that they had ever seen any cattle within one mile of the place of the accident.

J. P. USHER,
Attorney for Plaintiffs in Error.

Supreme Court of the United States.

DECEMBER TERM, 1870.

ROBERT M. SHOEMAKER ET AL.
vs.
E. W. KINGSBURY.
No. ~~xx~~ 188

POINTS FOR DEFENDANTS IN ERROR.

I.

The first point to be noticed is the question of jurisdiction. This depends either upon a clerical misprision, or else upon a fraud upon two courts, of which plaintiffs in error cannot avail themselves. On 24th January, 1868, (page 3 of the Record,) the defendants presented a petition under section 12 of the judiciary act, wh[illegible] forth that Kingsbury is a citizen of Kansas, Shoemaker is a citizen of *Kansas*, and Ed[illegible] citizen of Missouri; and, after setting for[illegible] facts, they ask that the case be transferre[illegible] court of the United States of Kansas.

Upon the affidavit of Carlos Greeley, and [illegible] papers and proofs may have been offered [illegible] thereafter, the court ordered the cause to be removed, &c. The cause was tried and judgment had against the plaintiffs in error. Now, for the first time, they urge that the circuit court did not acquire jurisdiction of the case, because the *petition* did not aver that Shoemaker was a citizen of *Ohio*, as he proved that he was. But this is clearly a clerical misprision, however it occurred, and one which

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a/

a/

Upon the affidavit of Carlos Greeley, and whatever other papers and proofs may have been offered on 5th February thereafter, the court ordered the cause to be removed, &c. The cause was tried and judgment had against the plaintiffs in error. Now, for the first time, they urge that the circuit court did not acquire jurisdiction of the case, because the *petition* did not aver that Shoemaker was a citizen of *Ohio*, as he proved that he was. But this is clearly a clerical misprision, however it occurred, and one which

will not prevent this court from rendering a judgment according to the very right of the cause. (Parks *v.* Turner, 12 How., 39; Downing *v.* Hicks, 14 How., 240; Railroad Co. *v.* Lindsay, 4 Wall., 656.)

The fair presumption is, that the error has been committed by the clerk in transcribing; for it is not to be supposed that the petition was misread to the State judge, or that he ordered the removal of the cause upon an insufficient motion, or that, in claiming federal jurisdiction, the parties were guilty of a contempt, which might have exposed them to penal consequences. (Eberly *v.* Allison, 24 How., 158.)

The defendants cannot be heard to say, "We procured the removal upon sufficient proofs, but an insufficient petition; we deceived the State court as to its duties; we deceived the United States circuit court as to its jurisdiction; we had a trial in the jurisdiction of our own selection; we more than waived all previous irregularities; but now we object, that the court of our own selection never obtained jurisdiction of the cause: and therefore the proceedings in that court are *coram non judice.*" (Bushnell *v.* Kennedy, 9 Wall., 390–394; Sayles *v.* Northwestern Insurance Company, 2 Curtis, 212.)

The first of these cases answers all objections about the want of service upon Miller, who is shown to be rightly in court, about his christian name, and all other questions of mere irregularity. The second case shows that the plaintiffs in error are in no condition to question their own action in the premises. It also shows that the jurisdiction of the circuit court does not depend upon the averment of citizenship in the petition of the plaintiff below, but upon the *fact* of the transfer of the cause upon the motion of the defendants below.

The philosophy of this rule is fully explained in Osborn *v.* The Bank of the United States, (9 Wheat., 739.)

The jurisdiction depends not upon the Constitution and the —— section of the judiciary act, but upon the 12th section of the act, which specially confers the jurisdiction.

II.

Want of jurisdiction over the parties is waived by appearance and pleading to issue. (Rhode Island *v.* Massachusetts, 12 Pet., 657; The Bee *v.* Wave, 332; Wick *v.* Strong, 6 McL., 587; Heriot *v.* Davis, 2 W. & M., 229.)

III.

Believing that the objections to the jurisdiction are answered, we pass to the inquiry, is there any other fact in the record of which this court can take cognizance?

There are bills of exceptions to certain instructions of the court; but in those bills there are no facts upon which these charges rested. And although, after the court had overruled the motions for a new trial and in arrest of judgment, the jury, on motion of the defendant, certifies a statement of the facts proved, the court cannot consider those facts, in order to determine the correctness of the instructions; and hence there is really nothing for the revision of the court.

In that statement of facts there are notes of the overruling of two questions, which were immaterial to the issue, and the simple statement that the defendants excepted to this ruling. But this hardly saves the point upon these rulings; and, if it does, this bill of exceptions then and there exhausts its purpose. For the court will not look to this bill of exceptions in order to ascertain whether the giving or refusing any particular instruction was correct. The rule is, to state the point in the charge, and the evidence which determines the correctness of that charge.

The rule is fully stated in Lincoln *v.* Clafflin, (7 Wall., 136,) viz: "The bill of exceptions should only present the rulings of the court upon some matter of law, and should contain only such evidence as may be necessary to explain the bearing of the rulings upon the issues involved."

And a statement of facts, filed by the judge without the

consent of the parties, must be treated as a nullity. (Generes *v.* Bennemer, 7 Wall., 565.

IV.

But should the court look to the whole record to ascertain the correctness of the instructions given or refused, then, according to the rulings of this court, it will be found the action of the court upon the whole case is substantially correct. For the want of time to print, the court is referred to the cases in Brightly's Digest of Decisions, pp. 340, 673, 674.

Certainly the doctrines as to the liability of carriers was correctly defined, as is shown in Mr. Earl's brief.

Respectfully submitted,

GEO. W. PASCHAL.

No. 188.

Supreme Court of the United States.

DECEMBER TERM, 1870.

ROBERT M. SHOEMAKER AND EDWARD MILLER,
Plaintiffs-in-Error,

vs.

E. W. KINGSBURY, *Defendant-in-Error.*

The case, now to be considered, is brought into this Court, by writ of error, from the Circuit Court of the United States for the District of Kansas.

The facts of the case, involving the questions of law which we are about presenting for the adjudication of this Court, are substantially as follows:

In 1867, Shoemaker and Miller, the defendants below, but plaintiffs-in-error, held a contract for building the Eastern Division of the Union Pacific Railway. Having constructed this Road about one hundred and sixty-five miles West of Ellsworth, in the State of Kansas, they run cars over the route as far as finished, and carried passengers for hire and reward.

On the eighth day of October, 1867, Kingsbury, the defendant-in-error, engaged passage of the plaintiffs-in-error, to be by them safely carried over their Road, from Ellsworth to Walker's Creek, and thence back to Ellsworth. He paid his fare, or passage-money, and was traveling on business connected with his office as Sheriff of Ellsworth County. The train from Ellsworth to Walker's Creek was made up and run in the usual way of making up and running Railway trains, the engine being in front, heading west, with the caboose and flat-cars attached in regular order. But on the return trip from Walker's Creek, the usual order for making up such trains was reversed. Neither the engine nor the tender could be turned, no *turn-table* having been

furnished by the plaintiffs-in-error west of Ellsworth,—both engine and tender therefore were literally backed over the route, a distance of over fifty miles: the tender was ahead, the engine next, the caboose and other cars were attached, and followed in regular order. When about three miles from Ellsworth, on this return trip, both the engine and tender were thrown from the track and capsized.

At the time the accident occurred, Kingsbury, the plaintiff in the Circuit Court, was riding in the caboose car, with the conductor of the train: this car had large sliding doors at each side, but no door in the front or rear: it was divided into two apartments by a partition running from one side of the car to the other, in which partition was a door: Kingsbury was sitting in the apartment nearest the engine, with his hand on the door knob. He suddenly heard a rumbling noise, experienced a jostling of the car, and, according to his testimony, was thrown through the partition door, and out one of the side doors to the ground, and thereby sustained the injuries complained of in this action.

It may be proper to state that the testimony on this part of the case is somewhat conflicting: the Conductor of the train swears, that the first intimation he had of the accident, proceeded from a *rumbling noise*, an *escape of steam*, and *a bumping of the car:* that as soon as the rumbling noise commenced, he saw Kingsbury jump up, and leave the apartment in which he was sitting, and *thinks* he jumped out of the car, as nothing occurred before that time "*to tip a man out.*"

It appears, in evidence, that the accident was occasioned by the running of the engine and tender over a steer, which leaped suddenly on the track immediately before the advancing tender. It is claimed, by the plaintiffs-in-error, that this steer was concealed among the high weeds, or grass, growing on the South side of the track: that these weeds were high enough to conceal a common work-animal: that they grew within four or five feet from the ends of the ties; that the steer leaped suddenly on the track, about twenty feet from the tender; and that the movement was so sudden, there was no time for the engineer to do anything to arrest the progress of the train. It is very evident from testimony furnished by the defendant's own witnesses, that no whistles sounded for down brakes; that no signals of danger were given; and

that no lights were used on either the engine or tender, although the accident occurred after dark.

An effort was made by the defendants' below, to prove, that the accident occurred at a place where animals had not before been known to be, and where there was no reason to cause the said defendants, or their agents, to expect them to be; but this effort failed; a number of witnesses swore, that animals had before been seen in that neighborhood; that Williams, who owned the steer which caused the accident, lived within two miles of the Railroad, and about four miles from the town of Ellsworth, and owned four steers; that Dougherty, who lived nearer the town than Williams, owned stock, which had been seen in the neighborhood of the accident; and that trains of cattle came into Ellsworth, and were allowed to range around the country three and four miles from the town. Such is, in brief, the material facts of this case as established by the evidence.

The plaintiff below brought suit for damages in the Circuit Court of the United States, and alleged, in his petition, that the injuries he sustained, were occasioned by the negligence and carelessness of the defendants, or their agents, and without any fault or negligence of his own.

At the trial, he asked of the court seven different instructions to the jury: the first, second, third, fifth, sixth and seventh of which were given; the fourth was refused.

The defendants asked for eight instructions to the jury: the first, second, third, fourth, fifth, sixth and eighth of which were given; the seventh was refused.

The defendants excepted to the ruling of the court as to the fifth and sixth instructions granted at the instance of the plaintiff; and also excepted to the court's refusal of their seventh instruction. No exceptions were taken by the plaintiff below, and it is now for this Honorable Court to review the alleged errors.

The fifth instruction, asked for by the plaintiff, and granted by the Circuit Court, is in the following words:

"When it is proved that the car was thrown from the track, and the plaintiff injured, it is incumbent on the defendants to prove that the agents and servants in charge of the train were persons of competent skill, of good habits, and in every respect qualified

and suitably prepared for the business in which they were engaged, and that they acted on this occasion with reasonable skill, and with the utmost prudence and caution; and if the disaster in question was occasioned, by the least negligence, or want of skill, or prudence on their part, then the defendants are liable in this action."

The sixth instruction is as follows:

"If the jury find there was no want of proper skill or care or caution on the part of the defendants, and their employees, and that the accident to the plaintiff occurred by his act in rashly and improperly springing or jumping from the train, the defendants are not liable in this action; but if the want of proper care or skill of the defendants, or their employees, placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the train would upset or be thrown from the track, or that the defendants' employees were incapable of managing the train, the plaintiff is entitled to recover, although the jury may believe, from the position in which the train was placed by the negligence of the defendants employees, the attempt of the plaintiff to escape may have increased the peril, or even caused the accident, and although they may also find that the plaintiff would probably have sustained little or no injury if he had remained in the caboose; and if the jury find from the evidence that the plaintiff, at the time he jumped or was thrown from the train, was in peril of life or limb by reason of the mismanagement of the train, then in such case no fault is to be imputed to the plaintiff by attempting to save his life, or to prevent harm to his body."

The seventh instruction asked for by the defendants, but which was refused by the Circuit Court, is in the words following:

"When the facts are uncontroverted, the question of negligence is a question of law for the Court. Now, the testimony is, without contradiction, that the animal suddenly leaped on the track immediately before the advancing tender, at a place where animals had not before been known to be, and where there was no reason to cause the defendants or their servants to expect them to be; that it was so sudden, there was not time for the engineer to do anything to stop the progress of the train; that the tender

and locomotive, running upon the animal, were instantly capsized; that the plaintiff leaped or was thrown from the caboose, and was injured. Under such circumstances it must, by the law, be held to have been an unavoidable accident to the plaintiff, and the verdict should be for the defendants."

The defendant-in-error will contend, that the fifth instruction of the court is in exact conformity with the law as pronounced by the Supreme Court of the United States in the case of Stokes vs. Saltonstall, 13 Peters, 185.

In this case, the Court, in its instructions to the jury, held, that the facts, that the carriage was upset and the plaintiff's wife injured, are *prima facie* evidence that there was negligence, or want of skill on the part of the driver, and throws upon the defendant the burden of proving that the accident was not occasioned by the driver's fault.

And again:

"It being admitted that the carriage was upset and the plaintiff's wife injured, it is incumbent on the defendant to prove the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he engaged, and that he acted on this occasion with reasonable skill and with the utmost prudence and caution; and if the disaster in question was occasioned by the least negligence, or want of skill or prudence on his part, that the defendant is liable in this action.'

The fifth instruction in this case of Shoemaker and Miller vs. Kingsbury, is taken, almost word for word, from the Court's instructions in the case of Stokes vs. Saltonstall, and its reversal, would be equivalent to an overruling of the law laid down by the Court, in that case, and would unsettle the decisions bearing on the same questions in numerous cases throughout the country.

In the case of the Baltimore and Ohio Railroad Company vs. Worthington, 21 Maryland, 282 and 283, the Court held, "that the injury to the plaintiff (Worthington) was *prima facie* evidence of negligence on the part of the defendants, and it was incumbent on them to prove, that they were not negligent in order to discharge themselves from liability."

And again, "that it was a question of fact for the jury to de-

termine from *all the evidence in the cause*, whether the injury to the plaintiff arose from any neglect on the part of the defendants, or their agents, and if the jury should find that the injury in question was the result of an accident or act against which human care and foresight could not guard, and was not the result of negligence, in any degree, on the part of the defendants, then the plaintiff was not entitled to recover."

The learned counsel for the Railroad Company objected to these instructions chiefly because, the injury to Worthington was declared to be presumptive evidence of negligence, without prescribing any legal measure of proof by which the presumption could be rebutted, but referred to the case of Stokes vs. Saltonstall as furnishing the correct standard by which to determine whether the defendants were in fault or not.

The Court of Appeals of Maryland, in delivering its opinion in this case, said, that the cases of Stokes vs. Saltonstall, 13 Peters, and Stockton vs Frey, 4 Gill, 414, conclusively established the law, and that, in such cases, the occurrence of the accident, amounted to *prima facie* evidence of negligence on the part of the defendants, throwing upon them the onus of rebutting the presumption by proving there was no negligence.

Reference is further made to the case of Galena & Chicago Railway vs. Yarwood, 17 Ill., 509, where the Court, in delivering its opinion, held, "that a passenger in a Railway car need only show, that he has received an injury to make a *prima facie* case against the carrier: the carrier must rebut the presumption to exonerate himself from responsibility."

In further support of this rule of law reference is made to the following cases:

Crofts vs. Waterhouse, 3 Bing., 319.
Ware vs. Gay, 11 Pick., 106.
Christie vs. Griggs, 2 Camp., 79.
Hegeman vs. Western Railway, 16 Barb., 353, 356.
Holbrook vs. Utica & Schen. Railway, 20 Barb., 282.
Nashville & Chat. Railway vs. Messino, 1 Sneed, 221.

2. The defendant-in-error will further contend, that the Circuit Court committed no error in its sixth instruction to the jury.

The first clause of this instruction will probably not be controverted. It maintains, that if the jury find there was no want of

proper skill, or care, or caution, on the part of the defendants below, or their employees, and that the injuries sustained by Kingsbury were occasioned by his own rash and improper conduct in jumping from the car, the defendants are not liable in this action.

Nor is there error in the other branch of the instruction. Redfield, in his treatise on the law of Railways, says, "that a passenger who is induced to leap from a car by a well-founded apprehension of peril to life or limb, induced by any occurrences which might have been guarded against by the utmost care of the carriers, is entitled to recover for any injury which he may thereby sustain, even where no injury would have occurred had he remained quiet, or where the conduct of the passenger contributed to produce or enhance the injury."

Kingsbury, it will be remembered, at the time of the accident, was sitting with the conductor, in the caboose: According to his own testimony, he was thrown out of the car. The conductor thinks he jumped out, but, if he jumped at all, it was not until after the accident occurred, and his apprehensions of danger had been fully aroused by *the rumbling noise*, *the escape of steam*, and *the bumping of the car*, referred to by the conductor in his evidence. If therefore it be shown, that he really jumped from the car, he acted under a well-founded fear of danger, which is ample justification; for, in the case of the Galena & Chicago Railway vs. Yarwood, 17 Ill., 509, the Court held, "that persons in positions of great peril, are not required to exercise all the presence of mind and care of a prudent, careful man under ordinary circumstances; the law makes allowance for them, and leaves the circumstances of their conduct to the jury."

In the case of the Railway Company vs. Aspell, 23 Penn. St., 147, 150, it is held—

"If a person should leap from the cars under the influence of a well-grounded fear that a fatal collision is about to take place, his claim against the company for the injury he may suffer, will be as good as if the same mischief had been done by the apprehended collision itself." And in the case of the Philadelphia and Reading Railroad Company vs. Derby, 14 Howard, 469, Derby, the plaintiff below, was a stockholder in the company. He was traveling over a portion of the route as an invited guest. He paid no fare or passage-money. In anticipation of a collision with a train moving in the opposite direction, he jumped, or at-

tempted to jump, from the car in which he was riding, and received the injuries of which he complained. He brought suit in the Circuit Court of the United States for the Eastern District of Pennsylvania, and the verdict being in his favor, the case was brought, by writ of error, to the Supreme Court of the United States, which affirmed the judgment of the Court below.

Reference is further made to the following cases:

Ingalls vs. Bills, 9 Met. 1.
Eldridge vs. Long Island Railway Co., 1 Sandf. 89.
Frink vs. Potter, 17 Ill. 406.
Southwestern Railway Co. vs. Paulk, 24 Ga. 356.
Jones vs. Boyce, 1 Stark, 493.

3. The defendant-in-error will further contend, that the seventh instruction asked for by the defendants below, was properly rejected by the Court.

Because it assumes, that the facts in the case are uncontroverted, and being uncontroverted, the question of negligence becomes a question of law for the Court. It is often difficult to determine whether negligence is a question for the Court or for the jury. In Doorman vs. Jenkins, 3 Ad. & Ellis, 256, all the judges concurred in saying, that no general rule on the subject could be laid down; that in some cases the negligence depended entirely upon the law, and was then a question for the Court; in others, it depended on facts, or inferences from facts, and was then a question for the jury. In many leading cases, it has been held, that want of care, or negligence, of whatever degree, is a question of fact to be decided by the jury.

In still another class of cases, it has been regarded as a mixed question of law and fact, where the finding of the jury should be aided rather than controlled by instructions from the Court. In these cases the jury may properly be directed as to the degree of care required, and generally as to the law of the contract or undertaking, but the weight of authorities, show, that negligence is a fact, which the jury, when informed as to the law, may deduce from all the circumstances established by the evidence, Reference is made to the following authorities:

1 Eng. Railway cases, 852.
Aldridge vs. Great W. R. Co., 19 Conn., 570.
Pierce on Railways, 282, 284 and 357.

Beers on Housatonic R. R. Co., 19 Conn., 566.
Maryland Digest, 661.

But again; this seventh instruction was properly rejected, because it assumes that the testimony is without contradiction, "that the animal, which caused the accident, suddenly leaped on the track immediately before the advancing tender, at a place where animals had not before been known to be and where there was no reason to cause the defendants or their servants to expect them to be; that it was so sudden, there was not time for the engineer to do anything to stop the progress of the train; that the tender and locomotive running upon the animal, were instantly capsized."

It is only necessary in answer to this assumption of the facts to refer to the evidence of Whitney, Sanderson and Delacour, on the 30th page of the printed record. It is there conclusively proven that animals had before been seen in the neighborhood of the accident; and that trains of cattle, brought into Ellsworth, were permitted to range for miles around the country.

But if the facts as stated were uncontroverted, which is by no means conceded, the court properly refused the instruction, because there are numerous other facts in this case, tending to establish negligence on the part of the defendants; and in passing on the question of negligence, the jury should be allowed to make up their verdict from all the evidence brought out at the trial.

Here, the defendants make up a meager and partial statement of the facts, and ask the Court, to instruct the jury, that under such circumstances as they state, "it must, by the law, be held to have been an unavoidable accident to the plaintiff, and the verdict should be for defendants."

This instruction if given in the form desired, would have ignored the jury altogether, although, outside of the facts therein stated, there are other facts in the case, well established, and tending to show negligence on the part of the defendants. Their failure to furnish a *turn-table* West of Ellsworth, in consequence of which they were compelled to back their engine and tender over the route, on the return trip from Walker's Creek, involved the question of negligence, to be determined by the jury.

It is in evidence that the train was running at the time of the accident without lights, though it was then after dark; this is another circumstance to be passed upon by the jury in determining the question of negligence. In the case of Crofts vs. Waterhouse, 3 Bing., 319, Chief Justice Best refers to the use of lights by night as one of the requirements to be observed by a carrier of passengers, and which, if not fulfilled, renders the carrier responsible for any injury which may be sustained.

In the case of Bass vs. The Chicago, Burlington and Quincy Railroad, 28 Ill., 9, it was held by the Court, to be negligence in a Railway Company to allow vegetation to grow upon its right of way so that cattle might be concealed from view. The steer which caused the accident in this case, was seen, according to the evidence, to jump from the high weeds *on the south side of the track*. He was there concealed: these weeds were only four or five feet from the ends of the cross-ties, sufficiently near to enable the steer to leap, at one bound, upon the track, and endanger the lives of passengers.

All these questions, involving the negligence of the defendants, would have been effectually withheld from the jury, had this seventh instruction, asked for by the defendants, been granted by the Court. It was, therefore, properly rejected.

Again, not only the facts, but the conclusions of law asked for by the defendants in their seventh instruction, are controverted.

The Supreme Court of Pennsylvania have held, that the fact of an animal being upon the track is *prima facie* evidence of negligence in the company, they being bound as between themselves and their passengers to keep the road free from all obstructions of that character.

This language was used by the Court:

"We do not wish to be understood as laying down a general rule, that all railroad companies are bound, independently of legislative enactment, to fence their roads from end to end, but we do insist that they are bound to carry passengers safely, or to compensate them in damages.

As between the company and the passenger, the company is bound to see that cattle are fenced out. If cattle are accustomed to wander on unenclosed ground, through which the road runs, the company are bound to take notice of this fact, and either by

fencing in their track, or by enforcing the owner's obligation to keep his cattle at home, or by moderating the speed of the train, or in some other manner, to secure the safety of the passenger. That is their paramount duty. And it is no answer to an action by a passenger against a carrier, that the injury was caused by the negligence or even the trespass of a third party."

Sullivan vs. Phil. & Reading Railway, 30 Penn. S., 234.
6 Am. Law Reg., 342.
Skinner's Case.

The onus of rebutting the *prima facie* case of negligence is on the defendants, and this can only be done by proving the facts and circumstances explaining the cause of the accident. These facts are for the jury to determine from all the evidence in this cause. It is for the carrier to show and so explain the cause of the injury as to satisfy the jury that it was unavoidable, and could not have been prevented by human care and foresight.

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9. Wall. 394 Bushnell v. Kennedy

30 Texas. 487

appendix to Red price

39. N.Y. 228. Edgerton

35 N.H. Smith v East R.R